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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 171.

THE CENTRAL PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE STATE OF NEVADA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

FILED OCTOBER 5, 1892.

(15,160.)

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1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the State of Nevada, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Nevada, before you, between The State of Nevada, plaintiff, and The Central Pacific Railroad Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said Central Pacific Railroad Company, as by its complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second
2 Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at the city of Washington, this sixth day of September, A. D. 1892, and of the year of our Independence the one hundred and seventeenth.

Seal U. S. Circuit Court, Ninth Circuit, District of Nevada.

T. J. EDWARDS,
Clerk U. S. Circuit Court, 9th Circuit, District of Nevada.

By reason of the absence and inability of the Hon. Chas. H. Belknap, chief justice of the supreme court of the State of Nevada, the application for the allowance of a writ of error was presented to me as one of the associate justices of said supreme court, and said writ of error is allowed by me, as prayed for in said application, this the 6th day of September, A. D. 1892.

R. R. BIGELOW,
3 *Associate Justice of the Supreme Court of the State of Nevada.*

(Endorsed:) Filed September 6th, 1892. Joe Josephs, clerk supreme court Nevada.

Petition for Allowance for Writ.

In the Supreme Court of the State of Nevada.

CENTRAL PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
THE STATE OF NEVADA, Defendant in Error.

To the Hon. Charles H. Belknap, chief justice of the supreme court of the State of Nevada, or, in case of his absence or inability, to the Hon. R. R. Bigelow, one of the associate justices of said supreme court:

Petition for allowance of writ of error in action No. 1357, supreme court series, and being an action brought to recover judgment against plaintiff in error by defendant in error for the taxes of the year 1889.

Your petitioner, The Central Pacific Railroad Company, as plaintiff in error, would respectfully show the following: That this action was originally commenced in the district court of the State of
4 Nevada, in and for the county of Lander, upon the 3d day of December, 1890, by The State of Nevada as plaintiff against The Central Pacific Railroad Company as defendant, to recover a judgment for certain taxes alleged to be due from plaintiff in error to defendant in error upon certain property described in the record herein, including the taxes claimed to be due upon 122,824 acres of unpatented lands, being a portion of the lands embraced within the limits of the grant made by the Government of the United States to the Pacific railroads.

That said 122,824 acres were assessed for said year 1889 at fifty cents per acre.

That the tax levy for the said year 1889 was $4.05 on each $100 valuation.

That said defendant in error, as such plaintiff, did, upon the 3d day of January, 1891, file an amended complaint in said action in said district court, and that said plaintiff in error, as such defendant, did thereafter and in due time file its answer to said amended complaint, and did thereafter file its amendment to its said answer.

That said pleadings are all herein specially referred to and are made a part thereof and will comprise in part the record upon the allowance of the writ of error herein applied for.

That in said amendment to the answer of the plaintiff in error it was made to appear that the costs of surveying, selecting, and
5 conveying 122,824 acres of the lands described in said amended complaint had never been paid by the plaintiff in error to the Government of the United States, and that the same were at the commencement of this action still due and unpaid.

That thereafter, to wit, upon the 29th day of July, 1891, said cause came on for trial in said district court; whereupon the parties

to said action submitted and caused to be filed in said cause an agreed statement of facts, constituting all the evidence in said cause.

That in said agreed statement of facts it was stipulated and agreed that of the lands described in said amended complaint 131,386 acres were surveyed, but unpatented, and that the costs of surveying, selecting, and conveying 122,824 acres thereof had never been paid.

That, said cause having been taken under advisement, the said district court did thereafter and upon the 25th day of February, 1892, cause to be filed its decision and order for judgment, and that thereupon a judgment was rendered and entered against plaintiff in error and in favor of defendant in error for the sum of $2,660.57, together with penalties and costs; which said judgment in-
6 cluded all taxes claimed and alleged to be due from plaintiff in error to defendant in error upon said 122,824 acres of lands for the year 1889.

That plaintiff in error thereafter, to wit, upon the 3d day of March, 1892, made application to said district court for a new trial in said cause and filed and served its statement under the rule and practice in the State of Nevada, and that thereafter said district court, upon the 12th day of March, 1892, made and entered its order denying the application of plaintiff in error for a new trial therein.

That plaintiff in error in its specifications and assignments of error, and for the purpose of showing wherein such judgment and decision were not supported by the evidence, allege the following, to wit: "That said decision and judgment are each against law and the evidence, as contained in said agreed statement of facts, and such evidence is insufficient to justify or sustain the same or either of them, in this: That appellant was and is not liable for the taxes claimed upon the said 122,824 acres of land, for the reason that the Government of the United States has never been paid the costs of surveying, selecting, or conveying the same, and the same still remains unpaid, and for the further reason that the State
7 of Nevada has never by its proper legislative department accepted the terms or conditions contained in that certain act of Congress entitled 'An act to provide for taxation of railroad-grant lands and for other purposes,' approved July 10, 1886.

"That said decision and judgment are each of them against law in this, that the State of Nevada has never by its proper legislative department provided by appropriate legislation for the protection and security of the lien of the United States for the costs of surveying, selecting, and conveying said 122,824 acres of land under the provisions of said act of Congress."

That upon said application for a new trial in said district court plaintiff in error contended that under the provisions of said act of Congress said 122,824 acres of land were not subject to taxation, for the reason that there had been no legislative acceptance by the State of Nevada of the terms and conditions imposed in and by said act of Congress.

That before said lands could be made the subject of taxation it was necessary that the State of Nevada, by appropriate legislation,

should protect the lien of the Government of the United
8 States for the costs of surveying, selecting, and conveying said lands.

That the grant of the power to tax said lands by the State of Nevada was conditional, dependent upon the acceptance of the terms and conditions imposed in and by said act of Congress, and that the State of Nevada had never, by any means whatever, accepted the terms and conditions imposed by said act of Congress.

That said judgment and decision in said district court were adverse to the contention of plaintiff in error, and said district court did hold, decide, and adjudge that said 122,824 acres were subject to taxation, notwithstanding the provisions of said act of Congress.

That thereafter said plaintiff in error took and prosecuted an appeal to the supreme court of the State of Nevada, and that the judgment and decision of said district court were affirmed in said supreme court upon the 8th day of August, 1892.

That said judgment of affirmance in said supreme court was a final judgment upon the merits in the court of last resort in said State of Nevada.

That there is and was directly involved in said action the
9 right and power of the State of Nevada or of any county in said State of Nevada to levy, enforce, or collect any tax for State, county, or municipal purposes upon any of said 122,824 acres of land, and that there was also involved in said action a claim of exemption and immunity from taxation as to said lands under the provisions of said act of Congress, and by reason of the fact that the costs of surveying, selecting, and conveying said lands had never been paid, and by reason of the further fact that the terms and conditions imposed by said act of Congress had never been accepted by the legislative authority of the State of Nevada.

That plaintiff in error, for the purpose of showing that a Federal question was and is presented in this cause, and that there is directly involved herein a construction of said act of Congress, hereby refers to and makes a part of this petition points 1, 2, and 3 of the syllabus prepared by the associate justice of the supreme court rendering said decision of affirmance in the action for the taxes upon said lands for the year 1888, being supreme court series No. 1356, said points being as follows, to wit: "1. Since the act of Congress of
10 July 10, 1886, the surveyed but unpatented lands within the grant to the Central Pacific railroad are no longer exempt from taxation by reason of the Government lien thereon for the costs of surveying, &c. The conditions contained in that act to the effect that the lien shall continue, and that the United States may become a preferred purchaser at any tax sale of such land control such sales, and there is no necessity for a legislative acceptance by the States of the conditions of the act.

"2. Congress, having full control over the public domain, may make it subject to State taxation upon such conditions as are deemed proper, and then, if so taxed, it must be done subject to those conditions.

"3. The act of July 10, 1886, is a grant to the States of the right

to tax lands in which the United States still has such an interest as renders them exempt, and, being beneficial, its acceptance by the grantee will be presumed."

Plaintiff in error, for the purpose of further showing that a Federal question was and is presented in this cause, and that there is directly involved herein a construction of said act of Congress, hereby refers to and makes a part of this petition the following extract from the decision of the said supreme court in said action
11 No. 1356, to wit: "Again, it would seem that the fact that these lands have been assessed by the State, and that the State is now in court endeavoring to enforce that assessment, which without this act it clearly had no right to assess, should of itself be considered an acceptance of the conditions therein contained."

Plaintiff in error would further show that in this action No. 1357 the same question was presented as to the taxation of said 122,824 acres of unpatented lands as was presented and decided in said action No. 1356, and plaintiff, for the purpose of showing that the decision was also adverse to plaintiff in error in this action herein, quotes point 1 of the syllabus in this action, to wit: "1. Former cases to the effect that surveyed lands within the Pacific Railroad grants are subject to taxation, and that unsurveyed lands are not, followed."

Plaintiff further refers to and makes a part of this petition the following extract from the opinion and decisions of said supreme court in this action, to wit: "In this case there are cross-appeals which will be considered together. The action was brought to recover taxes for the year 1889 upon the same lands as those under consideration in the case of The State *vs.* The C. P. R. R., No. 1356. The questions presented concerning the taxability of a possessory claim to surveyed and unsurveyed lands within the defend-
12 ant's land grant are the same as those presented in the case mentioned, which will be followed here."

Therefore the plaintiff in error claims and asserts that the construction of said act of Congress, to wit, "An act to provide for taxation of railroad grant lands and for other purposes," approved July 10, 1886, is and was directly involved in this action, and that the question of the right, privilege, and immunity of plaintiff in error to be relieved from taxation under the terms and conditions of said act of Congress *were* directly presented as to said lands, and that said judgment of affirmance was adverse to plaintiff in error, and that said supreme court decided against the contention of plaintiff in error; all of which will fully appear by the record of said action in this court.

The plaintiff in error, desiring to have said judgment and decision of affirmance in said supreme court reviewed by the Supreme Court of the United States, respectfully petitions your honor to allow said action and the record therein to be taken and removed to said Supreme Court of the United States, upon a writ of error issued therefrom to this court, and that your honor sign and
13 issue a citation therein as required by law in order that your petitioner may secure such final decision and judgment in said

Supreme Court of the United States as in law and equity it is entitled to.

Plaintiff in error further alleges that said judgment in said district court, together with said judgment of affirmance in said supreme court of the State of Nevada, was a personal judgment and not a judgment *in rem*.

Wherefore your petitioner prays that it may be allowed by your honor to file said writ of error, and that a citation may issue as is by law in such cases required, and that the bond herewith tendered may be accepted and approved, and that the same may be taken and held to be a supersedeas bond in these proceedings, and that an order be made staying execution pending such writ of error.

CENTRAL PACIFIC RAILROAD COMPANY,
Plaintiff in Error.

BAKER, WINES & DORSEY,
Attorneys for Plaintiff in Error.

By reason of the absence and inability of the Hon. Chas. H. Belknap, chief justice of the supreme court of the State of Nevada, the above petition for the allowance of a writ of error was presented to me as one of the associate justices of said supreme court,
14 and said writ of error is allowed by me as herein prayed for this the 6th day of September, A. D. 1892.

R. R. BIGELOW,
Associate Justice of the Supreme Court of the State of Nevada.

(Endorsed:) Filed September 6, 1892. Joe Josephs, clerk supreme court, Nevada.

15 *Citation.*

In the Supreme Court of the State of Nevada.

THE CENTRAL PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
THE STATE OF NEVADA, Defendant in Error.

To The State of Nevada, the above-named defendant in error, and to its attorney of record, Hon. James D. Torreyson, attorney general:

You are hereby cited and admonished to be and appear at a session or term of the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of Nevada, wherein The Central Pacific Railroad Company, a corporation, is plaintiff in error and you, The State of Nevada, are the defendant in error, to show cause, if any there be, why the decision and judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be
16 corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Witness my hand, at Carson City, Nevada, this 6th day of September, A. D. 1892.

R. R. BIGELOW,
Associate Justice of the Supreme Court of the State of Nevada.

Service by copy of the foregoing citation admitted this 6th day of September, A. D. 1892.

JAMES D. TORREYSON,
Attorney General of the State of Nevada and Attorney for Defendant in Error.

(Endorsed:) Filed September 6, 1892. Joe Josephs, clerk supreme court, Nevada.

17 *Bond.*

In the Supreme Court of the United States.

CENTRAL PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE STATE OF NEVADA, Defendant in Error.

Know all men by these presents that we, The Central Pacific Railroad Company, as principal, and D. L. Bliss and J. R. Bradley, as sureties, are held and firmly bound unto the State of Nevada in the sum of nine thousand five hundred dollars ($9,500) in lawful money of the United States of America, to be paid to the said State of Nevada or its proper assigns; for true payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, successors, and assigns, jointly, severally, and firmly, by these presents.

Sealed with our seals and dated this sixth day of September, 1892.

The condition of the above obligation is such that whereas the said Central Pacific Railroad Company, as plaintiff in error, has applied for, obtained, prosecuted, and will prosecute a writ of error, directed to the supreme court of the State of Nevada, to the
18 Supreme Court of the United States, to reverse the judgment and decision rendered and entered in — by the said supreme court of the State of Nevada, in the above action, in which said action the defendant in error was the plaintiff and the plaintiff in error was the defendant, and in which said action there was a judgment rendered and entered in favor of said defendant in error and against said plaintiff in error for the sum of two thousand six hundred and sixty and $\frac{57}{100}$ ($2,660.57) dollars, being the amount of the principal of said judgment, with ten per cent. (10%) penalty and twenty-five per cent. (25%) statutory damages thereon, together with costs of suit, including district attorney's fees, amounting to five hundred and forty-two $\frac{39}{100}$ ($542.39) dollars, with legal interest from the 25th day of February, 1892, said judgment having been affirmed and entered in said supreme court upon the eighth day of August, 1892:

Now, therefore, if the said Central Pacific Railroad Company, as such plaintiff in error, shall duly prosecute its said writ of error in the Supreme Court of the United States to effect and shall answer to and pay all damages and costs if it shall fail to make good
19 its said writ and plea, and shall also pay the full amount of said judgment, with all interest, penalties, and costs, together with just damages for delay, and all costs and interests by reason of said writ of error, then this obligation shall be void and of no effect; otherwise it shall remain in full force against us, jointly and severally, both in law and in equity.

D. L. BLISS. [SEAL.]
J. R. BRADLEY. [SEAL.]

Sealed and delivered in presence of—
JOE JOSEPHS.

UNITED STATES OF AMERICA,
State of Nevada, County of Ormsby, } ss:

D. L. Bliss and J. R. Bradley, as sureties on the above and foregoing bond and obligation, being duly sworn, each for himself and not one for the other, says: I am a citizen and resident of the State of Nevada and a freeholder and householder therein; that I am worth the amount specified in the said bond or obligation as the penalty thereof, to wit, the sum of nine thousand five hundred dollars, in property situated in said State of Nevada, over and above all my debts and my liabilities, exclusive of property exempt from
20 attachment, execution, or forced sale.

D. L. BLISS.
J. R. BRADLEY.

Sworn to before me and subscribed in my presence this the 6 day of September, 1892.

[Seal of Supreme Court, Nevada.]

JOE JOSEPHS,
Clerk Supreme Court, State of Nevada.

The above and foregoing bond is hereby approved and is also approved as a supersedeas bond, and remittitur will be stayed pending writ of error.

September 6th, 1892.

R. R. BIGELOW,
Associate Justice of the Supreme Court of the State of Nevada.

(Endorsed:) Filed September 6, 1892. Joe Josephs, clerk supreme court, Nevada.

21 In the Supreme Court of the State of Nevada.

Amended Complaint.

In the District Court of the State of Nevada, County of Lander.

STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } No. 1939.

The above action was commenced in the above court by the filing of an original complaint upon the 3d day of December in the year 1890.

That a summons was regularly issued upon said complaint and served upon said defendant. That thereafter, upon the 3d
22 day of January, 1891, the plaintiff, by leave of court, filed an amended complaint, the same being as follows, to wit:

STATE OF NEVADA, }
County of Lander, } *ss:*

In the District Court of the State of Nevada in and for Lander County.

THE STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, a Corporation Duly Organized and Existing under and by Virtue of the Laws of the State of California, and the Property, Real Estate, and Improvements in the County of Lander, State of Nevada, Described as Follows, to wit:

"Here follows the description of the property which is the same in the transcripts of these cases on the appeal of the State of these cases and to which reference is hereby made and made a part hereof, the land in said descriptions being described by legal subdivisions."

In the foregoing enumeration of lands the several townships and ranges are, townships north and ranges east of Mount Diablo base and meridian.

The said property being the same described in the assessment-roll of said county for the fiscal year 1890, defendants.

The State of Nevada, by W. D. Jones, district and prosecut-
23 ing attorney of the county of Lander, State of Nevada, complains of Central Pacific Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and the property, real estate and improvements in the county of Lander, State of Nevada, described as follows, to wit:

"Here follows the description of the property which is the same in the transcripts of these cases, on the appeal of the State of these cases, and to which reference is hereby made and made a part

Now, therefore, if the said Central Pacific Railroad Company, as such plaintiff in error, shall duly prosecute its said writ of error in the Supreme Court of the United States to effect and shall answer to and pay all damages and costs if it shall fail to make good
19 its said writ and plea, and shall also pay the full amount of said judgment, with all interest, penalties, and costs, together with just damages for delay, and all costs and interests by reason of said writ of error, then this obligation shall be void and of no effect; otherwise it shall remain in full force against us, jointly and severally, both in law and in equity.

D. L. BLISS. [SEAL.]
J. R. BRADLEY. [SEAL.]

Sealed and delivered in presence of—
JOE JOSEPHS.

UNITED STATES OF AMERICA,
State of Nevada, County of Ormsby, } ss:

D. L. Bliss and J. R. Bradley, as sureties on the above and foregoing bond and obligation, being duly sworn, each for himself and not one for the other, says: I am a citizen and resident of the State of Nevada and a freeholder and householder therein; that I am worth the amount specified in the said bond or obligation as the penalty thereof, to wit, the sum of nine thousand five hundred dollars, in property situated in said State of Nevada, over and above all my debts and my liabilities, exclusive of property exempt from
20 attachment, execution, or forced sale.

D. L. BLISS.
J. R. BRADLEY.

Sworn to before me and subscribed in my presence this the 6 day of September, 1892.

[Seal of Supreme Court, Nevada.]

JOE JOSEPHS,
Clerk Supreme Court, State of Nevada.

The above and foregoing bond is hereby approved and is also approved as a supersedeas bond, and remittitur will be stayed pending writ of error.
September 6th, 1892.

R. R. BIGELOW,
Associate Justice of the Supreme Court of the State of Nevada.

(Endorsed:) Filed September 6, 1892. Joe Josephs, clerk supreme court, Nevada.

21 In the Supreme Court of the State of Nevada.

Amended Complaint.

In the District Court of the State of Nevada, County of Lander.

STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant. } No. 1939.

The above action was commenced in the above court by the filing of an original complaint upon the 3d day of December in the year 1890.

That a summons was regularly issued upon said complaint and served upon said defendant. That thereafter, upon the 3d
22 day of January, 1891, the plaintiff, by leave of court, filed an amended complaint, the same being as follows, to wit:

STATE OF NEVADA, }
County of Lander, } *ss*:

In the District Court of the State of Nevada in and for Lander County.

THE STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, a Corporation Duly Organized and Existing under and by Virtue of the Laws of the State of California, and the Property, Real Estate, and Improvements in the County of Lander, State of Nevada, Described as Follows, to wit:

"Here follows the description of the property which is the same in the transcripts of these cases on the appeal of the State of these cases and to which reference is hereby made and made a part hereof, the land in said descriptions being described by legal subdivisions."

In the foregoing enumeration of lands the several townships and ranges are, townships north and ranges east of Mount Diablo base and meridian.

The said property being the same described in the assessment-roll of said county for the fiscal year 1890, defendants.

The State of Nevada, by W. D. Jones, district and prosecut-
23 ing attorney of the county of Lander, State of Nevada, complains of Central Pacific Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and the property, real estate and improvements in the county of Lander, State of Nevada, described as follows, to wit:

"Here follows the description of the property which is the same in the transcripts of these cases, on the appeal of the State of these cases, and to which reference is hereby made and made a part

hereof, the land in said discriptions being described by legal subdivisions."

In the foregoing enumeration of lands the several townships and ranges are, townships north and ranges east of Mount Diablo base and meridian.

The said property being the same described in the assessment-roll of said county for the fiscal year 1889, defendants.

And for cause of action says, that in pursuance of the laws of the State of Nevada, the board of county commissioners of said Lander county did in and for the fiscal year 1889 duly levy upon all the taxable property within said county of Lander a tax of $3.80 upon each $100 value of property within said county, and twenty-five cents upon each $100 value of taxable property within the Argenta school district, in said county of Lander, as a special tax duly levied and assessed for said year for school purposes for said school
24 district, that between the second day of January, 1889, and the first Monday of September, 1889, in the county of Lander, State of Nevada, Jefferson Hull, then and there being county assessor of said county, did duly assess and put down on an assessment-roll, all the real estate and personal property in said county subject to taxation, and that said assessment-roll was afterwards submitted to the board of equalization of said county, and was by said board duly equalized.

That said Central Pacific Railroad Company was then and there the owner of, and that there was duly assessed to it, the above-described real estate, and that upon such property there has been duly levied for the fiscal year A. D. 1889, a State tax of $1,483.31, and a county tax of $5,191.60, including the said school tax, amounting in the whole to $6,674.91, all of which is due and unpaid, of which amount all of said $6,674.91 was duly levied against said real estate.

That this above-described real estate is the same described in said assessment-roll and assessed as aforesaid; that the said Central Pacific Railroad Company was, at the dates above named and for a long time prior thereto, had been and now is, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the city and county of San Francisco, State of California.

25 Wherefore, said plaintiff prays for judgment against the said Central Pacific Railroad Company for the sum of $6,674.91, the whole of said tax, and for a separate judgment against said real estate for the sum of $6,674.91, the tax due on said real estate, and $667.49, the ten per cent. damages for the non-payment thereof at the time as required by law, and $1,668.72, the additional penalty of twenty-five per cent. as provided by law, and five per cent. on $9,011.12, the whole amount due for district attorney's fees, and an additional sum of $5 for district attorney's fees, amounting in all for district attorney's fees to the sum of $455.55, and amounting in all in taxes, ten per cent. damages, twenty-five per cent. penalty and the district attorney's fees, aforesaid, to the sum of $9,466.67, and for such other judgment as to justice belongs, and for all costs subsequent to the assessment of said taxes and of this action, includ-

ing the district attorney's fees, clerk's fees, sheriff's fees and all other fees allowed by law, and for interest at the rate of seven per cent. per annum till paid.

W. D. JONES,
District and Prosecuting Attorney in and for the County of Lander, State of Nevada, and
HENRY MAYENBAUM,
Attorney for Plaintiff.

Endorsed: No. 1939. The State of Nevada, plaintiff, *vs.* Central Pacific Railroad Company *et als.*, defendants. Amended complaint. Filed January 3, 1891. J. A. Miller, clerk.

26 That thereafter the defendant, Central Pacific Railroad Company, filed its answer to said amended complaint the same being as follows, to wit:

Answer.

In the District Court of the State of Nevada, Lander County.

THE STATE OF NEVADA *vs.* THE CENTRAL PACIFIC RAILROAD COMPANY and Certain Lands Described in the Complaint.	Action No. 1939.

Now comes the defendant answering for itself and for the lands described in the complaint, and in answer to the amended complaint herein, denies that Jefferson Hull, the county assessor of Lander county, State of Nevada, for the year 1889, or any other person as assessor of, or in behalf of said county for said year, assessed to this defendant 354,536 acres of land or any part or portion thereof; but in this behalf alleges, that said assessor assessed to this defendant a possessory claim to 354,536 acres of land. But this defendant denies that at the time mentioned in said complaint or at any other time or at all, it ever had, owned, claimed or possessed any "possessory claim" to said lands or to any part or portion thereof; that it ever had or now has any "possessory interest" of, in, or
27 to any of the lands described in the complaint or the possession of the same or any part thereof and the only right or interest of this defendant to any of said lands, save and except 24,123 acres thereof, is that derived by virtue of the acts of Congress, granting lands in aid of the construction of a railroad from the Missouri river to the Pacific ocean, approved July 1, 1862, and July 2, 1864, and denies that its said right or interest to said lands, if any it has under said acts of Congress, was ever assessed to it by said assessor of Lander county, Nevada, for 1889; denies that the area of the grant of land by the Government of the United States to this defendant in said county of Lander, comprises or includes 354,536 acres, or any other or greater number, so far as the same has ever

been ascertained by the public surveys of the United States, than — acres, and that the remaining portion of said grant in said county was in said year 1889, unsurveyed and unseggregated from the public domain and has never been by any officer of the United States, either surveyed, seggregated, set apart to, or shown to be a part or parcel of the lands granted to this defendant under said acts of Congress, and is not included in any levy of taxes made by the county commissioners of Lander county for the year 1889, and subject to assessment against this defendant therein.

Denies that it had situated in Lander county for the year
28 1889, and subject to assessment therein, any other or greater number than — acres, and denies that any interest which it had or possessed in said lands, was ever assessed to it for said year 1889, by the assessor of said county of Lander, or that it was placed upon the assessment-roll of said county for said year.

Denies that it claims any title, interest or other right, to any of the surveyed lands described in the complaint, save and except to — acres thereof, and its only interest in those lands is that derived by the grants aforesaid, and that said interest, if any, was not assessed to it by said assessor of said county of Lander for the year 1889.

Defendant in this behalf further alleges that of the lands attempted to be described in said amended complaint and being those embraced within the limits of the grant to the Pacific railroads under said acts of Congress, there are and will be, if the same shall ever be surveyed by the Government of the United States within said county of Lander at least, and not less than — acres of land which are now wholly unsurveyed and that as to such lands the section lines have not been run nor established, nor have the odd-numbered sections ever been seggregated from the body of the public lands of the Government of the United States and it is now impossible to ascertain or determine where said odd-numbered sections will be located or established when the same shall have been surveyed.

29 Defendant further answering said amended complaint, denies that it was, at any time the assessment mentioned in said complaint was made, or at any time during the year 1889, or at any time since, the owner of the following-described lands, or that it was at any of said dates the owner of any claim, title or interest in any of said lands, or that it had and claimed, owned, or asserted any possession, possessory claim, or possessory interest of, in, or to any of said lands, the same being a part and portion of those described in the said complaint and being described as follows, to wit: The east ½ of east ½ of section 29, township 34 north, range 44 east; south ½ of section 33, township 34 north, range 44 east; southeast ¼ of section 25, township 34 north, range 47 east; southeast ¼ of section 35, township 34 north, range 47 east; west ½ of sections 7, 19, 31, township 33 north, range 48 east; west ½ of section 31, township 34 north, range 44 east; south ½ of section 13, township 36 north, range 45 east, and southeast ¼ of section 36, township 32 north, range 44 east, comprising 2,560 acres.

Defendant further answering said amended complaint alleges that the following-described lands, being a part and portion of the lands described in the complaint, are not within the limits of the grant to the defendant and do not comprise any portion of the lands granted to the defendant by the Government of the United
30 States by said acts of Congress, and, therefore, defendant denies that it is, or that it ever was the owner, or that it ever had any interest, right, title or claim, or possession in, or to, said lands, the same being described as follows, to wit: The southwest ¼ of section 1, township 28 north, range 45 east, outside of railroad limits; lots 1 and 2, southeast ¼ of section 1, township 28 north, range 46 east; east ½ of west ½ of section 19, township 36 north, range 48 east; east ½ of west ½ of section 31, township 36 north, range 48 east.

Defendant further answering said amended complaint alleges that, heretofore, to wit, on the 18th day of December, 1889, an action was regularly commenced in this court by the plaintiff herein and against this defendant by the filing of a complaint and the issuance of a summons thereon. That said action was brought to recover a judgment for the taxes alleged to be due upon all the lands and real estate mentioned and described in the amended complaint herein and that all said lands and real estate as aforesaid were described and embraced in said complaint so commenced upon the said 18th day of December, 1889, and that the said cause of action so far as it applied to said lands and real estate is, and was, the same identical cause of action as the cause of action set up and described in the amended complaint in this action. Defendant further alleges that it duly appeared in said action so commenced upon said 18th day of December, 1889, and upon the 6th
31 day of February, 1890, filed its answer in said cause and therein fully joined and presented an issue upon every fact alleged in said complaint and therein fully denied the authority to assess and levy a tax upon the lands and real estate mentioned and described in the amended complaint herein. Defendant further answering said amended complaint alleges that in due time said action so commenced upon the said 18th day of December, 1889, came regularly on for trial in this court upon the issues presented by said complaint and answer and such proceedings were regularly had therein; that thereafter and upon the 18th day of April, 1890, a judgment was duly given, made and entered in said cause in this court in favor of said plaintiff and against this defendant for the sum of $24,209.75, and five per cent. thereon for district attorney's fees, amounting to $1,210.48, and $608 costs of suit and interest on $24,209.75 at the rate of seven per cent. per annum from the said 18th day of April, 1890, until paid. Defendant further alleges that said judgment so rendered in favor of the plaintiff and against the defendant herein in said action so commenced upon said 18th day of December, 1889, remained in full force and effect and unreversed until the 27th day of December, 1890, when the same was fully paid off and discharged by this defendant. Defendant further answering alleges that said action so commenced, as aforesaid, upon

the 18th day of December, 1889, was based upon one
32 entire cause of action and was brought for the purpose of recovering the entire judgment against defendant for the whole of the taxes alleged to be due from defendant upon its property situated in Lander county, State of Nevada, for the said year, 1889. Defendant further alleges that the cause of action set fourth and embraced in the amended complaint is for the taxes for said year, 1889, and is for the taxes alleged to be due upon the same lands embraced and included in the same action so commenced upon the 18th day of December, 1889, and none other. Wherefore, defendant alleges that plaintiff is estopped and barred by said judgment from further prosecuting this action and that all the facts, matters and things set forth and relied upon in this action were litigated and determined in said action so commenced upon the said 18th day of December, 1889.

Defendant further alleges that the said Jefferson Hull, as assessor of Lander county as aforesaid, in making up and entering the assessment of said lands to this defendant for the fiscal year 1889, assessed and placed them upon the assessment-roll in the following manner, to wit:

"Possessory claim to the following-described tracts, pieces and parcels of land in the enumeration of which lands unsurveyed are described as their designation will appear when the surveys of the United States are extended over them, and all lands surveyed
are described as shown by the map of surveys furnished to
33 the assessor of Lander county by the surveyor general and *ex officio* land register of the State of Nevada, as provided by law. Said lands being lands in Lander county, Nevada, granted to the Central Pacific Railroad Company by the United States, by act of Congress of July 1, 1862, as amended by act of Congress of July 2, 1864."

That said assessor accompanied said assessment by a congressional description of three hundred and fifty-three thousand, seven hundred and forty-nine (353,749) acres of land; but neither said assessment-roll nor the amended complaint in this action separated the surveyed lands from those which are unsurveyed, or those which might be taxed from those which are exempt from taxation, and the whole of said lands are and were assessed as a unit, and a joint or aggregate levy of taxes for said year, 1889, was made upon all property mentioned and described in the amended complaint herein embracing and including the unsurveyed lands. Defendant further alleges that said assessment and the whole thereof is invalid and void; that no valuation was ever made by said assessor of the lands of this defendant situated in said county, and subject to taxation therein seperate and apart from those lands which were unsurveyed and not subject to taxation, and, therefore, defendant denies that said assessor ever assessed any lands or any title, interest or claim or possession therein, or thereto, to, or against this
34 defendant, for said year, 1889. Defendant further denies that there was duly or otherwise levied upon the property of the defendant in said county, for said year, 1889, a State tax of — or any

other sum whatever, or a county tax of — or any other sum whatever, or an aggregate sum of — or any other sum whatever, but in this behalf alleges by way of explanation that said levy was made as stated in said complaint as a unit and included and was based upon certain property owned by, and assessable to, this defendant, and also — acres of unsurveyed lands, and that, therefore, said assessment and the whole thereof is null and void.

BAKER & WINES,
Attorneys for Defendant.

STATE OF NEVADA, }
County of Washoe, } ss:

J. L. Wines, being first duly sworn, deposes and says that he is the agent and one of the attorneys for said defendant, The Central Pacific Railroad Company, in the State of Nevada. That he has read the foregoing answer and knows the contents thereof and the same, and the statements herein contained are true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

J. L. WINES.

Subscribed and sworn to before me this 27th day of April, 1891.
[SEAL.] C. D. VAN DUZER,
Notary Public in and for the County of Washoe.

35 That the defendant and appellant herein, thereafter, by leave of court, filed its verified amendment to its said answer, wherein it was alleged that the costs of surveying, selecting and patenting one hundred and twenty-two thousand, eight hundred and twenty-four (122,824) acres of land, being a portion of the land described in said amended complaint, had never been paid, neither by the defendant in said action, the appellant herein, nor by any person for, or in its behalf, and that the same were due and unpaid.

Statement on Motion for New Trial.

In the District Court of the State of Nevada, County of Lander.

STATE OF NEVADA, Plaintiff and Respondent,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendant and Appellant. } No. 1939.

Be it remembered that the above cause came regularly on for trial before the court, a jury having been waived, upon the 29th day of July, 1891. The parties to said action consented to, and signed, and caused to be filed upon said day, a written statement of facts, and then agreed in open court that said cause be submitted to the court upon said agreed statement of facts and not otherwise. That said statement contained the following statement of facts in addition to other facts which are not pertinent or material upon the hearing of this application, to wit:

36 *Stipulation.*

In the District Court of the State of Nevada, County of Lander.

THE STATE OF NEVADA
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY. } Action No. 1839, for Taxes 1889.

It is hereby stipulated and agreed that the following shall be considered as the facts in the above-entitled cause. That 131,386 acres of land described in plaintiff's complaint on file herein, are surveyed, but unpatented. That prior to the year 1889, the defendant sold and conveyed its title to the east ½ of the east ½ of section 29; the south ½ of section 33, township 34 north, range 44 east; the southeast ¼ of section 25, and southeast ¼ of section 35, township 34 north, range 47 east; the west ½ of section 31, township 34 north, range 48 east, comprising 2,080 acres, and that said lands have never been reconveyed to said defendant. That the south ½ of sections 13, 15, and 17, of township 28 north, range 46 east, comprising 960 acres, are beyond the Central Pacific Railroad limits, are not, and never have been, the property of the defendant.

That the remainder of the lands described in said complaint, to wit, 195,200 acres, are unsurveyed.

37 That plaintiff heretofore commenced an action, No. 1906, against said defendant for the taxes of the year 1889, which embraced and included all the lands described in the amended complaint herein and in this stipulation. That upon the trial of this action upon motion of said plaintiff, through its district attorney, the following order was made by the court and entered of record, to wit:

Action No. 1906.

WEDNESDAY, *April* 16, 1890.

"On motion of district attorney it is hereby ordered that all that part of this action relating to the lands described in the complaint in said action by sections and fractional parts of sections, except the lands for which United States patent has been issued by the Government of the United States and the lands returned by the company to the assessors, is hereby dismissed. The above order includes southeast ¼ of section 36, township 32 north, range 44 east. That judgment was thereafter, in said action, No. 1906, rendered in favor of plaintiff and against defendant, but said judgment did not include the taxes on the lands described in the amended complaint herein and referred to in said order.

"That no testimony was introduced at said trial referring to the lands embraced in said order.

"That the costs of surveying, selecting and conveying 122,834 acres of the unpatented lands described in the said amended complaint herein have not been paid.

38 "That said defendant has heretofore mortgaged said lands described in said complaint and has leased at divers times various portions thereof. That said defendant has never had any possession of any part of said lands other than such as may be inferred from executing said mortgages and leases and by virtue of the grants to it of 1862 and 1864.

"That the lands described in said complaint were taxed for the year 1889 upon a valuation of fifty cents per acre and at the rate of $4.05 upon each $160."

That thereafter the court having taken said cause under advisement for its determination upon the pleadings and said agreed statement of facts, to wit: upon the 25th day of February, 1892, caused to be filed in said cause its decision and order for judgment, the same being as follows, to wit:

39 *Decision.*

In the District Court of the State of Nevada, County of Lander.

THE STATE OF NEVADA, Plaintiff, *vs.* CENTRAL PACIFIC RAILROAD COMPANY, a Corporation, and the Property Described in the Complaint, Defendants. } Action No. 1939, for Taxes for 1889.

The questions relating to the taxation of lands are the same in this action as in case No. 1876, except as to the matter of estoppel, the lands described in the amended complaint herein were embraced in a prior action commenced against the defendant for the taxes for the year 1889. But on motion of the district attorney the court made an order dismissing these lands from that case and no testimony was introduced in regard to them, and the taxes due were not included in the judgment subsequently rendered therein. Although no one has any authority to release a party from the payment of taxes due, the dismissal and judgment in that case would seem to relieve the defendant from paying on the lands unless this action can be maintained. Counsel have, by analogy, cited many cases showing that a recovery by judgment on part of an entire demand bars further action. As between individuals this is a well-settled rule. It is also a principle of law that estoppel does not run
40 against the Government, and our own Supreme Court has stated that the objection on the ground that a multiplicity of suits should be avoided does not apply where the State is the plaintiff. A distinction seems to exist in that an individual can become bound and by dismissing, or suing, for a part of an entire claim for his recovery of the remainder, when no one would have authority to bar or bind the State.

State *vs.* California Mining Company, 15 Nevada, 390. It is not shown for what, or for taxes on what property, the plaintiff recovered judgment in the action from which these lands were dismissed. No authority has been cited holding that the taxes on separate

pieces of property for the same year might not be separate demands, except the dictum in City of Davenport *vs.* Chicago, R. I. & P. R. Co., 38 Iowa, 633. In that case the defendant plead an injunction on the prior year's taxes and the question decided by the court like that in State *vs.* Y. J. S. M. Co., 14 Nevada, was that one year's taxes was a cause of action separate from another year's; separate pieces of property are required to be separately assessed and separately sold and the owner is allowed to pay on any separate piece. No good reason appears for not allowing the State at its option to follow up the method of assessment by bringing separate suits if it appears to its advantage to do so. In the case of one tract
41 of land, for instance, suits should not be permitted for each acre or subdivision, nor where the defendant is assessed for a certain number of miles of railroad, should a suit be brought for each mile of road, but taxes delinquent on a railroad, on segregated and different classes of lands, on personal property, on the proceeds of mines, or on two ranches in different parts of a county, would seem to constitute causes of action as separate as mortgages on two disconnected pieces of property, real or personal. The questions involved in the suits might be, and likely would be, entirely different, even if the State could be estopped from collecting its taxes by an improper dismissal by its officers. It does not appear in this case that the cause of action for the taxes on these lands was not as separate from the other claim in the suit from which they were dismissed as two promissory notes. This case is quite different from The State *vs.* Cal. S. M. Co., 13 Nevada, 289, a question of dividing the tax from the penalty, but here it is not denied that the tax is due and unpaid, and as suggested by the court that the State ought to have some remedy and if it has none more affective it ought to prevail in this action. Under the decisions in this State it seems to be well settled that no one has any authority to, or can relieve a party from the payment of his taxes. This is a reasonable and just construction of the law, and it should not be held that the district attorney can indirectly, by reason of
42 a dismissal, release from the payment of taxes due, when neither he nor any other officer has the power to do so directly.

I conclude that the plaintiff is entitled to recover of the defendant, Central Pacific Railroad Company, the taxes for the year 1889, at the rate of $4.05 on each $100 valuation on 131,386 acres of surveyed lands, assessed at fifty cents per acre, amounting in taxes to..... $2,660 57
And for ten per cent. thereof for delinquency..... 266 05
And for twenty-five per cent. as liquidated damages.... 665 14

$3,591 76

And for costs of suit, including $184.59 for district attorney's fees, being $5.00, and five per cent. of the amount delinquent.

G. F. TALBOT,
District Judge.

Let judgment be entered accordingly.

Endorsed: No. 1939. Tax, 1889. The State of Nevada, pl'ff, *vs.* Central Pacific Railroad Company, def't. Decision. Filed Feb. 25, 1892. J. A. Miller.

That thereafter, in pursuance of said decision, a judgment was regularly entered in said court, as follows, to wit: For the sum of $2,660.57, together with ten per cent. thereon for delinquency, amounting to $266.05; also 25 per cent. as liquidated damages, amounting to $665.14; also district attorney's fees amounting to $184.59, together with the ordinary costs of suit, taxed at $357.80.

Assignments & Specifications of Errors.

That the said defendant, Central Pacific Railroad Company, as appellant, feeling itself aggrieved by said decision and judgment and desiring to apply for a new trial in said cause, now submits its assignments and specifications of error and alleges, wherein said evidence, as contained in said agreed statement of facts, is insufficient to justify and sustain said decision and judgment or either of them, and wherein the same are, and each of them is, against law, to wit: The said decision and judgment thereon show that said judgment was ordered, rendered and entered for the taxes claimed to be due upon 24,123 acres of patented land at an assessed valuation of $1.25 per acre, and also upon 131,386 acres of surveyed, but unpatented lands, at an assessed valuation of fifty cents per acre, while the evidence as contained in said agreement of facts, shows that said 131,386 acres of surveyed, unpatented land contained, embraced, and were made up in part of 122,824 acres of land, upon which the costs due the Government of the United States for the surveying, selecting and patenting of the same have never been paid.

That the evidence as contained in said agreed statement of facts also shows that the defendant and appellant is still indebted to the Government of the United States for the costs of surveying, selecting and conveying said 122,824 acres of lands; also the evidence as contained in said agreed statement of facts shows that neither said decision nor judgment are justified or supported by such evidence in this that it does show that said judgment ought not to have been rendered for more than the tax due upon said 24,123 acres at said valuation of $1.25 per acre, and upon 8,562 acres, being the difference between 131,386 acres, and 122,824 acres at said valuation of fifty cents per acre, with the statutory penalties provided by law. Also for the further reason that the evidence as contained in said agreed statement of facts shows that the only tax due from appellant, or for which it is liable in this action is the amount due upon said 24,123 acres, and said 8,562 acres together with the statutory penalty thereon.

That said decision and judgment are each against law, and the evidence, as contained in said agreed statement of facts, and such evidence is insufficient to justify or sustain the same, or either of them, in this: That appellant, was and is, not liable for the taxes

claimed upon the said 122,824 acres of land for the reason that the Government of the United States has never been paid the costs of surveying, selecting nor conveying the same, and the same still remains unpaid; and for the further reason that the State of Nevada has never by its proper legislative department accepted the terms or conditions contained in that certain act of Congress, entitled "An act to provide for taxation of railroad grant lands, and for other purposes." Approved July 10, 1886.

45 That said decision and judgment are each of them against law in this: that the State of Nevada has never, by its proper legislative department, provided by appropriate legislation for the protection and security of the lien of the United States for the costs of surveying, selecting and patenting said 122,824 acres of land under the provisions of said act of Congress.

That said evidence, as contained in said agreed statement of facts, is insufficient to, and does not justify nor sustain said decision or judgment, or either of them, in this: that the evidence fails to show that the costs of surveying, selecting and conveying said 122,824 acres of land have been paid, or that the lien of the Government of the United States for the same has ever been waived, or that the State of Nevada has ever accepted said act of Congress, or provided for the protection of such lien of the Government of the United States, as required by said act of Congress.

Appellant herein shows wherein the evidence, as contained in said agreed statement of facts, is further insufficient to justify or sustain said decision and judgment, or either of them, in this. That such evidence shows that another and a prior action, being No. 1906, was commenced in this court by the plaintiff and respondent herein, against the appellant herein, as defendant, to recover a judgment for the taxes due upon the lands described in the

46 amended complaint in this action. That said prior action was for the same amount and for the taxes of the same year and is claimed to be due upon the same land as in this action, and that a judgment was regularly and duly rendered and entered in said prior action, No. 1906, and that in said prior action the same cause of action was included and embraced as are included and embraced in this action, and that said prior action was in all respects the same as this action, and that after said judgment in said prior action had been regularly rendered and entered, the same was fully paid off and discharged by this appellant as such defendant, and such payment was accepted by respondent herein as plaintiff in said prior action.

That the evidence contained in said agreed statement of facts shows that the cause of action set forth and embraced in said prior action, No. 1906, is the identical cause of action set forth and embraced in this action, and that judgment was regularly entered in said prior action and that the same has been fully paid off and discharged.

That the evidence as contained in said agreed statement of facts shows that the decision of the court and the judgment thereon are, and each of them is, against law, in this; that the judgment ought

to have been in favor of the appellant and against respondent as to the whole amount of the tax sued for in this action, and which is claimed to be due upon the lands described in the amended
47 complaint in this action and which were also described in the complaint and embraced and included in said prior action, No. 1906.

Upon the above specifications showing wherein the evidence is insufficient to justify or support the decision or judgment of the court herein, and wherein the same are against law, appellant respectfully asks for a new trial in said cause.

Respectfully submitted.

BAKER, WINES & DORSEY,
Attorneys for Appellant.

Service of within statement on motion for new trial accepted after filing, this 3d day of March, 1892.

JAS. B. EGAN,
As District Attorney, Lander County, Nevada.

STATE OF NEVADA, } ss:
County of Lander, }

I, J. A. Miller, clerk of the district court of the State of Nevada, in and for Lander county, certify that no amendments to the foregoing statement have been filed.

March 9, 1892.

J. A. MILLER, *Clerk.*

Endorsed: No. 1939. In the supreme court of the State of Nevada. The State of Nevada, respondent and plaintiff, *vs.* Central Pacific Railroad Company, appellant and defendant. Proposed statement on motion for new trial. Filed March 3d, 1892. J. A. Miller, clerk. Baker, Wines & Dorsey, attorneys for appellant.

48 *Notice of Motion for New Trial.*

In the District Court of the State of Nevada, County of Lander.

THE STATE OF NEVADA, Plaintiff and Respondent,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendant and Appellant. } No. 1939.

To James B. Eagan, as district attorney of Lander county, State of Nevada, and Henry Mayenbaum, attorneys for the plaintiff and respondent above named, and to the said plaintiff:

You, and each of you, will take notice that the defendant and appellant above named will apply to, and move the court herein for an order setting aside and vacating the decision and judgment of the court in the above-entitled cause, rendered and entered in said cause, and for an order granting a new trial to said defendant and appellant, upon the grounds and for the reasons, to wit:

insufficiency of the evidence and admitted statement of facts to justify or sustain the decision and judgment of the court herein, and that the same are, and each of them is, against law. That the stipulated facts in the above cause constituting the findings therein, do not support nor justify the decision, nor the judgment of the court herein. That this application will be made upon a
49 statement to be hereafter filed and served, said decision having been filed herein upon the 25th day of February, 1892.

Dated this 3d day of March, 1892.

BAKER, WINES & DORSEY,
Attorneys for Defendant.

Endorsed: No. 1939. State of Nevada *vs.* C. P. R. R. Company. Notice of motion for new trial. Filed March 3d, 1892. J. A. Miller, clerk.

Service of copy after filing admitted this 3d day of March, 1892.

JAS. B. EAGAN,
As Dist. Att'y, Lander County, Nevada.

Order.

In the District Court of the State of Nevada, County of Lander.

THE STATE OF NEVADA, Plaintiff, *vs.* CENTRAL PACIFIC RAILROAD COMPANY and the Property Described in the Complaint, Defendants.	Action No. 1939, for Taxes for 1889.

For the reasons stated in the decision defendant's motion for a new trial in the above-entitled case is denied, and defendant excepts.

G. F. TALBOT,
District Judge.

Endorsed: No. 1939. Taxes for 1889. Distric tcourt, Lander county. State *vs.* C. P. R. R. Co. *et als.* Order denying defendant's motion for new trial. Filed March 12th, 1892. J. A. Miller, clerk.

50 *Notice of Appeal.*

In the District Court of the State of Nevada, County of Lander.

THE STATE OF NEVADA, Plaintiff, *vs.* CENTRAL PACIFIC RAILROAD COMPANY, Defendant.	No. 1939.

To James B. Eagan, as district attorney of Lander county, State of Nevada, and Henry Mayenbaum, attorney for plaintiff, and to said plaintiff, and to the clerk of said court:

You will take notice that the defendant hereby appeals, and does appeal to the supreme court of the State of Nevada, from the judg-

ment heretofore rendered and entered in said above-entitled action in favor of plaintiff and against the defendant, for the sum of $3,591.76, and costs taxed at $542.42, upon the 25th day of February, 1892, and also from the order denying and overruling the motion and application of said defendant above named for a new trial in said action made and entered in said cause upon the 12th day of March, 1892, and from the whole of said judgment and order and from each thereof. This appeal is taken, both upon questions of law and fact.

BAKER, WINES & DORSEY,
Attorneys for Appellant.

51 Service of within notice of appeal accepted by copy this 22d day of March, 1892, after filing.

JAS. B. EAGAN,
As District Attorney, Lander County, Nevada.

Endorsed: No. 1939. In the district court of the State of Nevada, county of Lander. The State of Nevada *vs.* Central Pacific Railroad Co. Notice of appeal. Filed March 22d, 1892. J. A. Miller, clerk. Baker, Wines & Dorsey, attorneys for defendant.

Undertaking on Appeal.

In the District Court of the State of Nevada, County of Lander.

THE STATE OF NEVADA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendants. } No. 1939.

Undertaking.

Know all men by these presents: That we, The Central Pacific Railroad Company, a corporation, as principal, and Leopold Steiner, residence, Austin, Nevada, occupation, stock-raiser, rancher, and Samuel Creecenzo, residence Austin, Nevada, occupation merchant, are held and firmly bound unto The State of Nevada, the plaintiff above named, in the sum of three hundred dollars ($300) for the true payment of which will and truly — be made,
52 we jointly and severally and firmly bind ourselves, our heirs, executors, administrators and assigns.

Dated and sealed with our private seals this 22d day of March, 1892.

LEOPOLD STEINER.
SAMUEL CREECENZO.

The condition and consideration of the above undertaking is such that, whereas, the said plaintiff did, upon the 25th day of February, 1892, obtain and recover a judgment against said defendant in the above-entitled court for the sum of $3,591.76, principal, judgment and costs taxed at $542.42, with interest as provided in said judg-

ment, and, whereas, said defendant has given notice of an appeal to the supreme court of the State of Nevada, from said judgment and the whole thereof, and from an order denying and overruling the application and motion of said defendant for a new trial in said action, and from the whole thereof, said order having been made and entered in said cause upon the 12th day of March, 1892. Now, therefore, in consideration of the premises and such appeal, we, the said Leopold Steiner and Samuel Creecenzo, as such sureties, do hereby promise, agree and undertake to and with said plaintiff, The State of Nevada, in the sum of three hundred dollars ($300) lawful money of the United States, that the said Central Pacific Railroad Company, a corporation, as such appellant, will pay all damages and costs which may be awarded against it on such appeal,
53 not exceeding the sum of three hundred dollars ($300), and in case of failure upon the part of said appellant to pay said sum, we, as such sureties, do jointly and severally acknowledge ourselves to be indebted unto the said State of Nevada to the amount and in the said sum of three hundred dollars ($300); and, whereas, the said Central Pacific Railroad Company, as such appellant, is desirous of obtaining and securing a stay of execution upon said judgment, and does hereby submit this undertaking under section 3364 of the General Statutes of the State of Nevada. Now, therefore, in consideration of the premises — of such appeal, and of such stay of execution upon said judgment, we, the said Central Pacific Railroad Company, as principal, and Leopold Steiner and Samuel Creecenzo, as sureties, do hereby jointly, severally and firmly undertake, promise and agree, to and with the State of Nevada, in the penal sum of $8,900, being double the amount of said judgment and costs, that if the judgment or order appealed from, or any part thereof, be affirmed, the said appellant shall and will pay the amount directed to be paid by said judgment or order, or the part of such amount as to which said judgment or order shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against said appellant upon said appeal, in the lawful money of the United States. And in case of a failure upon the part of said appellant to pay the
54 amount directed by the judgment or order of the court, upon such appeal, we, the said Leopold Steiner and Samuel Creecenzo do hereby jointly and severally acknowledge ourselves to owe, and to be indebted unto, the said State of Nevada, in the sum of eight thousand, nine hundred dollars ($8,900). That all the allegations and recitals contained in the foregoing undertaking for three hundred dollars ($300) are hereby expressly made a part of this undertaking in the last-named sum of eight thousand, nine hundred dollars ($8,900).

Witness our hands and private seals this, the 22d day of March, 1892.

LEOPOLD STEINER.
SAMUEL CREECENZO.

STATE OF NEVADA, } ss:
County of Lander, }

Leopold Steiner and Samuel Creecenzo, being each severally duly sworn for himself, and not one for the other, says: I am a resident and freeholder residing in Lander county, Nevada. That I am one of the sureties executing the above undertaking. That I am worth the amount specified therein as the penalty thereof, to wit: the sum of $8,900 over and above my just debts and liabilities, in real and personal property, exclusive of that exempt from seizure or forced sale.

LEOPOLD STEINER.
SAMUEL CREECENZO.

55 Subscribed and sworn to before me, this 22d day of March.
[SEAL.] J. A. MILLER, *Co. Clerk.*

Endorsed: No. 1939. In the district court of the State of Nevada, county of Lander. The State of Nevada *vs.* Central Pacific Railroad Company. Undertaking on appeal. Filed March 22, 1892. J. A. Miller, clerk. Baker, Wines & Dorsey, attorneys for defendant.

Certificate of Clerk.

In the District Court of the State of Nevada, County of Lander.

THE STATE OF NEVADA, Plaintiff,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Defendants.

I, J. A. Miller, county clerk of Lander county, State of Nevada, and *ex officio* clerk of the district court, in and for the county of Lander, State of Nevada, do hereby certify the foregoing to be a full and true copy and transcript of "engrossed statement on appeal," consisting of the following papers and records with the endorsements thereon, to wit: Amended complaint, answer, amendment to answer, proposed statement on motion for new trial,
56 notice of motion for new trial, order denying defendant's motion for new trial, notice of appeal, undertaking on appeal, the same being all the papers and records pertaining to said appeal, now on file and of record in my office.

[SEAL.] Witness my hand and the seal of said court this 28th day of March, 1892.

J. A. MILLER, *Clerk.*

Endorsed: No. 1939. The State of Nevada, plaintiff, *vs.* Central Pacific Railroad Company, defendant. Engrossed statement and record on appeal.

(Endorsed on cover:) No. 1357. In the supreme court of the State of Nevada. The State of Nevada, respondent, *v.* The Central Pacific Railroad Company, appellant. Transcript on appeal. Baker, Wines & Dorsey, attorneys for appellant. Filed April 4, 1892. Joe Josephs, clerk supreme court, Nevada.

57 *Order Submitting.*

In the Supreme Court of the State of Nevada.

CARSON CITY, *April* 4, 1892.

The court regularly met this the first day of the April term, A. D. 1892, and there were—

Present: Murphy, J., and Bigelow, J., and officers of the court.

* * * * * * *

THE STATE OF NEVADA, Respondent,
v.
THE CENTRAL PACIFIC RAILROAD COMPANY, Appellant. } No. 1357.

The above-named cause having been duly called from the calendar, when, upon motion of H. Mayenbaum, Esq., it was ordered by the court that * * * said cause be submitted on briefs as per stipulation on file. * * *

JOE JOSEPHS, *Clerk.*

58 *Stipulation.*

In the Supreme Court of the State of Nevada.

THE STATE OF NEVADA, Plaintiff,
vs.
CENTRAL PACIFIC RAILROAD COMPANY, Defendants.

There are three appeal cases of the above title and being appeals numbered as State appeals 1353, 1354, 1355.

And there are three appeal cases of the above title and being appeals by the defendants of the same cases and numbered 1356, 1357, and 1358.

Now it is stipulated that the above-named appeals be all submitted together on briefs. * * * The State has already filed its brief. The defendants must file their briefs in said cases within thirty days from this date, and the State may within ten days thereafter file its reply to said defendants' brief. The transcript of defendants' appeal may omit the printing of the description of the property wherever it occurs. * * *

And it is further stipulated that no objection whatever shall be made by either party to any of the transcripts, but the said transcripts shall be deemed sufficient in every respect, including the certificates of the clerk thereto.

J. D. TORREYSON,
Attorney General.
HENRY MAYENBAUM,
For State in All Cases.
BAKER, WINES & DORSEY,
Attorneys for Defendants in All Cases.

Carson, April 4, 1892.

(Endorsed:) Filed April 4, 1892. Joe Josephs, clerk supreme court, Nevada.

59 *Syllabus.*

In Supreme Court, State of Nevada.

THE STATE OF NEVADA, Appellant,
v.
THE CENTRAL PACIFIC RAILROAD COMPANY, Respondent. } No. 1354.

THE STATE OF NEVADA, Respondent,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Appellant. } No. 1357.

Syllabus by the judge.

1. Former cases to the effect that surveyed lands within the Pacific Railroad grants are subject to taxation, and that unsurveyed lands are not, followed.

2. Ordinarily a single cause of action cannot be split up and several actions brought upon it. This is a rule, however, of the common law which may be changed by statute. In tax cases this change has been made where the legislature provided that only certain defenses can be made to such action, in which this defense is not included.

3. The right of taxation, inherent in every form of government is vested in the legislature and is unlimited in that body except as restrained by constitutional provisions. The legislature may fix the amount, the time, and the manner of imposing taxes, and may regulate the processes and methods by which they are to be collected.

4. The constitutional provision that no person shall be deprived of property without due process of law does not require that delinquent taxes shall be collected by an action in court nor under the forms of legal procedure. If that method is adopted, the procedure is very much in the discretion of the legislature. All that is required under any system, is, that the substantial and fundamental rights of the tax-payers shall be protected. All defenses that savor of technicality only, or that do not show that he is being unjustly subjected to taxation, may be excluded.

5. The legislature has the power to provide that a former recovery shall not constitute a defense to an action to recover taxes.

Appeal from the district court of the State of Nevada, Lander county, G. F. Talbot, district judge; Henry Mayenbaum, J. B. Egan, district attorney, and J. D. Torreyson, attorney general, for the State; Baker, Wines and Dorsey, for the Central Pacific Railroad Company.

60 *Opinion by Bigelow, J.*

In this case there are cross-appeals which will be considered together. The action was brought to recover taxes for the year 1889 upon the same lands as those under consideration in the cases of

The State *vs.* The C. P. R. R., Nos. 1353 and 1356. The questions presented concerning the taxability of a possessory claim to surveyed and unsurveyed lands, within the defendant's land grant, are the same as those presented in the cases mentioned, which will be followed here.

The only other question involved is that concerning a plea of estoppel by a former judgment, set up by the defendant.

By this plea and the proofs it appeared that an action had been commenced against defendant to recover the taxes due upon this land, as well as a large amount of other property assessed to it in the same year; that upon the trial of that action the district attorney dismissed as to all of said lands, no evidence was offered concerning them, and the case then went to judgment upon the issues raised concerning the taxes due upon the other property. Does this constitute a bar to the maintenance of this action?

In actions between individuals a single cause of action, either upon contract or for a tort, will support but one action. If a single cause is split up, and two or more actions, brought upon it, a judgment entered in one of them is held to be *res adjudicata* as to the whole cause of action, and will be a bar to the maintenance of the others.

Free, judge, sec. 238.
Black, judge, 734.

This is the general rule, not by reason of any statutory provision to that effect, but as a general principle of the common law, which, subject to certain exceptions, unnecessary to be noticed here, is usually recognized and enforced.

This principle, however, like all common-law rights which have not been perpetuated by our constitution or the Constitution of the United States, is subject to legislative control and direction, and may be annulled, or certain cases excepted from its operation, at the pleasure of that body. It is claimed that this has been done by Gen. Stats., sec. 1108 (re-enacted, Stats. 1891, 135), which, after enumerating certain defenses which a defendant in an action to recover taxes may make by answer and which do not include that of a former recovery, further provides that "no other answer shall be permitted."

On the other hand it is contended that the legislature has no power under the constitution to exclude anything in a tax action that would be available as a defense in other actions, and, although there has never been any direct decision upon the point in this court, it must be admitted that it has several times been intimated that the legislature has no such power, and that the defense of a former recovery is as valid in such actions as in any other. We are of the opinion, however, that a careful consideration of the principles governing the assessment and collection of taxes will show that in regard to some defenses it does have this right, while perhaps as to others it does not.

The right to collect revenue for the support of the Government is one of the highest attributes of sovereignty, and belongs inherently

to every political community. "The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised by it or not."

Cooley Const. Lim., 6th edi., 587.

Chief Justice Marshall in the celebrated case of McCullough *vs.* Maryland, 4 Wheat., 428, uses this language: "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it."

This right to tax, which, from necessity, is inherent in every form of government, is vested with us in the legislature, and is unlimited, except as restricted by the constitution of our State or that of the United States.

Gibson *vs.* Mason, 5 Nev., 283, 305;
Peo. *vs.* Seymour, 16 Cal., 332, 342;
Wis. Cont. R. Co. *vs.* Taylor Co., 52 Wis., 37, 86.

"It is for the legislature to decide what persons and property shall be reached by the exercise of this function, and in what proportions and by what processes and instrumentalities taxes shall be assessed and collected."

St. Louis *vs.* The Ferry Co., 11 Wall., 423, 429.

These principles being admitted, or established, we may direct our attention at once to the constitution, to ascertain whether any provision therein contained requires that the defense set up in this action shall be permitted, or forbids the legislature from excluding it.

It will be observed that the plea we are considering does not allege that the taxes sued for were not properly levied or assessed or a proper charge against the defendant—in fact we have determined that a part of them are proper—nor does it assert that they have been paid. The defense is one purely technical and founded on what was clearly an irregularity upon the part of the district attorney in the management of the former case. The only suggestion made is, that the statute excluding it is in conflict with section 8 of article I of the constitution of this State, which declares that "No person shall * * * be deprived of life, liberty, or property without due process of law."

But it may be confidently asserted that this provision is only applicable to a limited extent to a proceeding to collect taxes. It certainly does not mean that there must necessarily be a decree or judgment or any action of a court whatever, to authorize its being legally done.

State *vs.* Allen, 2 McCord, 55, 60.
McMillan *vs.* Anderson, 95 U. S., 37, 41.
Davidson *vs.* New Orleans, 96 *id.*, 97, 102.

If such were the case the summary proceedings for their collection in such general vogue throughout the States, and now by our statute applicable to all cases where the taxes due amount to less than three hundred dollars, would not be admissible. But such summary methods are sanctioned by both precedent and practice, and are held not to conflict with the constitution.

McCarrel *vs.* Weeks, 5 Hayw., 246, 253;
Cooley's Const. Lim., 639;
Cooley's Tax, 302;
61 Black Tax Titles, sec. 44;
1 Blackwell Tax Titles, secs. 75, 100.

The only limitation that seems to be placed upon the power of the legislature to provide for such a system, is, that the legislature cannot direct that the purchaser at such a sale shall be put in possession, forcibly, and without a judicial hearing.

Calhoun *vs.* Fletcher, 63 Ala., 574, 582;
Black Tax Title, sec. 226;
Blackwell Tax Titles, sec. 75.

While the cases are not all in harmony as to just how far the legislature may go in dispensing with all action of the courts in the collection of taxes, it may be confidently asserted that such statutes will be held constitutional, if, by any means, the tax-payer is still left the privilege of appealing to the courts for the protection of his substantial rights in the premises. All technicality may be disregarded, and only the most meritorious objections allowed to constitute a defense to the titles transferred by such proceedings. Upon this point Mr. Blackwell in his treatise on tax titles, sec. 75, makes this summary: "Practically, the result of the cases is as follows: 1. Proper provisions for notice to the tax-payer must be made. It is not within the power of the legislature to dispense with that, nor to cure its absence. 2. If the taxes are paid before sale the proceedings are void, and no legislature can give title by, or cure title founded on a sale, after the taxes for which the land was ostensibly sold were paid. 3. In other respects the legislature may enact the conditions of sale, and may provide as to the manner of all proceedings."

Perhaps this statement of the law is not sufficiently guarded in some respects, but a review of the cases will show that the legislature is vested with a large amount of discretion in determining what shall or shall not constitute a defense to a proceeding to collect taxes.

A statute of the United States providing for the imposition and collection of direct taxes, authorized the officer selling under summary process to issue a certificate to the purchaser which was to be *prima facie* evidence of the regularity and validity of the tax sale, and of the title of the purchaser under it, and enacted that it should only be affected by proof that the lands were not subject to the tax, or that it had been paid previous to the sale, or the land redeemed subsequently. This statute was reviewed in De Treville *vs.* Smalls,

98 U. S., 517, and strictly upheld. It is there said: (page 525) "Besides, all possible attack upon the *prima facie* of the certificate was limited by the express provisions of the act, which enacted as before stated, that it should only be affected as evidence of the regularity and validity of sale, by establishing the fact that the property was not subject to taxes, or that the taxes had been paid previous to sale, or that the property had been redeemed. This left to the owner of lands subject to the tax every substantial right. It was his duty to pay the tax when due. His land was charged with it by act of Congress, not by the commissioners; and the proceeding ending in a sale was simply a mode of compelling the discharge of his duty. All his substantial rights were assured to him by the permission to show that he owed no tax, that his land was not taxable, that he had paid what was due, or that he had redeemed his land after sale. He was thus permitted to assert everything of substance—everything except mere irregularities. We do not feel at liberty to disregard the plain intention of the acts of Congress. We are not unmindful of the numerous decisions of State courts which have construed away the plain meaning of statutes providing for the collection of taxes, disregarding the spirit and often the letter of the enactments until of late years the astuteness of judicial refinement had rendered almost inoperative all legislative provisions for the sale of land for taxes. The consequence was that bidders at tax sales, if obtained at all, were mere speculations. To meet this tendency of judicial refinement very many States have of late adopted very rigid legislation. The acts of Congress we are considering must have had it in view. Hence the stringent provisions they contain. They declare, in effect, that the certificate of the commissioners' sale shall be evidence of compliance with the preliminary requisites of the sale, and that this evidence shall be rebutted only by proof of one or the other of three specified things. There is no possible excuse for not enforcing such statutes according to their letter and spirit." This ruling was again affirmed in Keeley *v.* Landers, 99 U. S., 441. In Iowa, a statute providing for summary sales of land for taxes enacted that the deed issued upon such sale should be *prima facie* evidence of certain facts, and conclusive evidence of others; which, of course, had the effect of declaring that the latter should not constitute any defense in an action between the owner of the land and the purchaser at a tax sale. In passing upon the validity of such legislation the court in Allen *v.* Armstrong, 16 Iowa, 508, 512, says: "There are minor matters in regard to the mode or manner of exercising the powers, which may be dispensed with, and consequently whose observance it is within the power of the legislature to provide, may be presumed from certain evidence, or certain other facts. * * *

After a careful examination of the provision of the section under consideration (section 784) in the light of the general principles of the law applicable to such subjects, we must say that there are some matters so vital and essential to any valid exercise of the taxing power and in relation to which the deed is by our law made conclusive evidence, that the law is, as to these, of questionable validity."

In McCready *v.* Sexton, 29 Iowa 356, 389, in an attempt to sum up the law a little more definitely, it is said that the assessment, the tax levy, the tax warrant authorizing the sale, and the sale itself, were essential to the exercise of the taxing power; that the legislature cannot dispense with an observance of these essential and jurisdictional steps, but that "every other provision of every revenue law may safely be said to be directory only, and not essential to the exercise of the taxing power," and that consequently the legislature may dispense with them altogether, or provide that their non-observance shall not constitute any defense.

In Abbott *v.* Lindenbower, 42 Mo., 162, 46 *id.*, 291, a similar statute came under consideration. For the purpose of invalidating the tax deed, which the plaintiff had placed in evidence, the defendant offered to prove, 1, that the land had not been duly assessed for the year 1883, at the time and in the manner required by law; 2, that the land was not assessed in the name of the real owner or any former owner, or any tenant or occupant of said land; 3, that all the land in the county had not been assessed, but much of it omitted from the assessment of that year; 4, that the tax book was not made out nor delivered to the collector in the manner or at the time prescribed by law; 5, that the collector did not proceed with the collection of such tax book, nor give notice of the time and place where he would receive the taxes assessed for said year, as required by law; 6, that the delinquent list was not made out and returned by the collector at the time or in the manner prescribed by law; 7, that the collector did not give, nor was the judgment rendered upon, proper notice of his application for judgment against said land for the taxes and costs due thereon; 8, that no precept for the sale of said land had been issued by the clerk; 9, that the land was not sold at the court-house door nor in the smallest subdivisions into which it could be divided, but was sold in gross. All these offers were excluded, and the court held properly so, except as to the second and seventh, which it was said were essential and jurisdictional, and such as the legislature could not dispense with. "With regard to the other matters of evidence above enumerated (except those two) we are inclined to think they were not essential prerequisites to the lawful taxing powers in the State, and that the act cannot be declared unconstitutional, for the reason that it makes the deed conclusive evidence that all these things had been rightly done. They were matters of form which might be taken against him by default." 42 Mo., 168. Upon the second appeal, in reply to the objection that the statute was altogether void, the court said (47 Mo., 296:) "Counsel insist that we should require the same amount of evidence to sustain the sale as if there were no statutory provision concerning the effect of the deed, and pronounce tax sales to be against common justice and right, and unworthy of favor. It is against common justice and right for a portion of the people to shirk the payment of taxes and thus throw an additional burden upon the better disposed; and courts should give effect to all just legislative provisions for the subjection of all property to an equal burden."

62 In Gibbs *v.* Dartch, 62 Miss., 671, a statute which directed that "no such conveyance or list (to be made by the officer selling for delinquent taxes) shall be invalidated, nor shall any defense be available against the title thus conveyed in any court of this State, except by proof that the taxes for which said lands were sold had been paid or tendered to the proper officer before sale," was upheld, except that it might also be shown in defense that there had been no assessment of the property, which was required by the Constitution. See also

Peo. *v.* Wilkerson, 1 Idaho, 619;
Peo. *v.* The Mayor, etc., 4 N. Y., 419;
S. C. and note, 55 Am. Dec., 266, 286.

If the legislature has the power, within certain limits, to prescribe what shall not be a defense as against a title transferred by a sale for delinquent taxes, where the tax-payer has had no previous opportunity for contesting the tax or the proceedings under it, it is perhaps hardly necessary to add that it may certainly do so under such a system as the one we are considering, where the defense is to be made prior to the judgment or sale.

In the cases of The State *v.* Cal. M. Co., 13 Nev., 289, 15 *id.* 234, it was conceded by counsel, and assumed by the court, that taking judgment for a part of the taxes due from a tax-payer under circumstances similar to those existing here, would be a bar to the maintenance of another action for the balance due, but the mind of the court was not directed to the statute which we have been considering, and the cases do not determine the point involved here. Still, in view of those cases, and of certain expressions to be found in other cases as to the authority of the legislature to exclude any defense in tax cases, we have examined the matter at greater length than we should otherwise have done. It may be added that by our Constitution, by the enabling act, and, without these, by paramount law, (Van Brocklin *v.* Tennessee, 117 U. S., 151) the State had no right to tax property of the United States, and if this statute could be so construed as to prohibit setting up the defense that such property is exempt, it would, to that extent, be null and void. See State *v.* C. P. R. R., 25 Pac. Rep., 442, and State *v.* Same, Nos. 1353 and 1356, (not yet reported). But this sufficiently appears from the principles of constitutional law already referred to.

Revenue—money, is what the State needs and must have to maintain its credit and keep the machinery of government in motion. Taxes are assessed upon the property of the people for the purpose of obtaining it. While the Constitution requires that property shall not be taken from the owner, either for taxes or anything else, without due process of law, that provision, as applied to the collection of taxes, requires the observance only of the most essential and fundamental steps. While the rights of the individual must be protected, the Government should not be unnecessarily hampered in its efforts to make collections, and certainly a law should not be declared to be beyond the power of the legislature, unless it appears without a reasonable doubt, that that body has exceeded the authority conferred

upon it by the Constitution. We know of no reason why a judgment entered for a part of a cause of action should not be a bar to another action, in tax cases as well as in others, except that the legislature has ordained otherwise, and in that respect the will of that body is supreme. Certainly it is to the interest of all that tax proceedings should be as simple, as inexpensive, and as certain, as possible, but as stated in De Treville *v.* Smalls, *supra*, and admitted by Judge Cooley (Cooley Tax, 354) the history of legislation upon this subject exhibits a continual struggle between the legislatures and the courts—the former endeavoring to clear the matter from technicalities, and the latter hedging it about by judicial refinement. Our own State is no exception to this tendency, but we do not think it should be carried further in that direction. We think the power of that body to exclude the defense offered in this case is clear and unmistakable, and that it is the duty of the court to follow the law as so established.

The judgment and orders overruling motions for new trial are affirmed.

BIGELOW, *J.*

We concur.

MURPHY, *J.*
BELKNAP, *C. J.*

(Endorsed:) Filed August 8, 1892. Joe Josephs, clerk supreme court, Nevada.

63 *Judgment.*

In Supreme Court, State of Nevada.

THE STATE OF NEVADA, Respondent,
vs.
THE CENTRAL PACIFIC RAILROAD COMPANY, Appellant.
} Appeal from the District Court, Lander County, Nevada. No. 1357.

The above-entitled cause came regularly on to be heard at a former day, when the same was regularly submitted on briefs filed by counsel for the respective parties, and was taken under advisement by the court.

And now, on this day, all and singular the law and the premises having been seen, heard, and fully considered, the opinion of the court is delivered by Bigelow, J.—Murphy, J., and Belknap, C. J., concurring—to the effect that the judgment of the district court is affirmed.

Whereupon it is now ordered, adjudged, and decreed by the court that the judgment of the district court in the State of Nevada in and for Lander county for an action brought for taxes for the year 1889, in the above-entitled cause, be, and the same is hereby, affirmed, with costs.

Judgment rendered August 8, 1892.

64 *Assignment of Error.*

In the Supreme Court of the United States.

CENTRAL PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE STATE OF NEVADA, Defendant in Error.

The Central Pacific Railroad Company, as plaintiff in error, in conjunction with its petition, herewith filed, praying for the allowance of a writ of error, herein submits the following assignments of error as having occurred in the making, rendering, and entering the judgment of affirmance mentioned in said petition in said action in the supreme court of the State of Nevada, to wit:

I.

The supreme court of the State of Nevada erred in affirming the judgment of the lower court as mentioned in the petition for the allowance of a writ of error filed herein by plaintiff in error.

II.

The supreme court of the State of Nevada erred in not reversing the judgment of said lower court wherein said lower court
65 held and adjudged that the 122,824 acres of land mentioned in the municipal taxation for the year 1889, and in holding and adjudging that the plaintiff in error was liable for the State and municipal taxes claimed and alleged to be due from plaintiff in error to defendant in error upon said lands for the year 1889.

III.

The supreme court of the State of Nevada erred in holding and deciding that that certain act of Congress entitled "An act to provide for taxation of railroad grant lands, and for other purposes," approved July 10, 1886, granted to and conferred upon the State of Nevada the right, power, and authority to levy and collect a tax upon said 122,824 acres of land for the year 1889.

IV.

The supreme court of the State of Nevada erred in holding and adjudging that there was no necessity for an acceptance by the State of Nevada of the terms and conditions imposed upon the State of Nevada by said act of Congress.

66 V.

The supreme court of the State of Nevada erred in holding and adjudging that lands embraced and included in the land grant of the United States to the Pacific railroads, upon which the costs of surveying, selecting, and conveying had not been paid, were subject to taxation by the State of Nevada for the year 1889.

VI.

The supreme court of the State of Nevada erred in affirming the judgment of the district court of the State of Nevada in and for Lander county, whereby and wherein said district court had ordered, rendered, and entered a judgment against plaintiff in error and in favor of defendant in error for the State and municipal taxes of the year 1889 upon 122,824 acres of land, at an assessed valuation of fifty cents per acre upon a tax levy of $4.05 per $100 valuation.

Wherefore, upon the foregoing assignments of errors, the plaintiff in error prays that the judgment of the said supreme court of the State of Nevada may be reviewed, corrected, and reversed, and that said plaintiff in error may have all such proper relief as it may be entitled to in the premises and under the law.

Respectfully submitted.

BAKER, WINES & DORSEY,
Attorneys for Plaintiff in Error.

67 (Endorsed:) Filed September 6, 1892. Joe Josephs, clerk supreme court, Nevada.

68 *Clerk's Certificate.*

STATE OF NEVADA, *ss:*

In the Supreme Court.

THE STATE OF NEVADA, Respondent,
v.
THE CENTRAL PACIFIC RAILROAD COMPANY, Appellant.

I, Joe Josephs, clerk of the supreme court of the State of Nevada, do hereby certify that the foregoing sixty-seven pages contain a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same, in the above-entitled cause; that the original writ of error and the citation, with its service endorsed thereon, are appended to the return herein, and that they are all returned to the Supreme Court of the United States, in obedience to the command of the writ of error hereto annexed.

Seal Supreme Court, State of Nevada.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Carson City, Nevada, this twelfth day of September, A. D. 1892.

JOE JOSEPHS,
Clerk Supreme Court, Nevada.

Endorsed on cover: Case No. 15,160. Nevada supreme court. Term No., 171. The Central Pacific Railroad Company, plaintiff in error, *vs.* The State of Nevada. Filed October 5th, 1892.

Office Supreme Court U. S.
FILED.
JAN 14 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

THE CENTRAL PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

AGAINST

THE STATE OF NEVADA,
Defendant in Error.

No. 171.

ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

Statement.

The facts in this case are the same as the facts in No. 170, between the same parties, except that this action is brought for the taxes of 1889.

There were some other questions in the Court below, but the Federal questions presented to this Court in this case are identical with those prescnted in the other case, No. 170.

The stipulation is the same (Record, pp. 16, 17); assignment of error the same (p. 19 *et seq.*). The Court, in its opinion, says that the Federal questions "are the same as those presented in the cases mentioned" (No. 170) "which will be followed here" (p. 28).

Plaintiff in error, therefore, submits this case upon the brief and argument submitted in No. 170, and claims:

POINTS.

I. That for the reasons stated on the brief in No. 170 the judgment herein should be reversed as to all lands not patented, or, at least, as to all lands not patented and survey fees not paid.

WHEELER H. PECKHAM,
Of Counsel for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 31 1895
JAMES H. McKENNEY
CLERK

CASE No. 171

OCTOBER TERM, 1895

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

THE CENTRAL PACIFIC RAILROAD COMPANY,

Plaintiff in Error.

vs.

THE STATE OF NEVADA.

In Error to the Supreme Court of the State of Nevada.

BRIEF AND ARGUMENT FOR THE STATE OF NEVADA

ROBERT M. BEATTY,

Attorney General of the State of Nevada.

HENRY MAYENBAUM,

Of Counsel.

15,160.

Filed 1895

15,160.

CASE NO. 171.

October Term, 1895.

In the Supreme Court of the United States.

THE CENTRAL PACIFIC RAILROAD COMPANY,
Plaintiff in Error,
v.
THE STATE OF NEVADA.

Brief and Argument for the State of Nevada.

May it please the Court:

There are two cases in this court, of the above title, on writs of error.

They are numbered 15,159 and 15,160. October Term, 1895, Nos. 170 and 171.

They are tax cases from the State of Nevada, brought here, upon writs of error, by the C. P. R. R. Co., plaintiff in error.

FIRST CASE NO. *170*—TAXES, *$3,642.17* FOR *1888*.

The 1st *case* in this court is *No. 170*, October term, 1895. It is a writ of error to the Nevada Supreme Court on a judgment in said State Court for taxes for the year *1888*, levied on the *possessory claim* of the C. P. R. R. Co. to *131,386* acres of *surveyed* lands. The judgment being for $3,642.17, and penalties and costs.

SECOND CASE *No. 171*—TAXES *$2,660.57* FOR *1889*.

The 2d case in this court is *No. 171*, October term, 1895. It is *also* a writ of error to said Nevada Supreme Court on a judgment in said State Court for taxes for the year *1889*, levied on the *said possessory claim* of said C. P. R. R. Co. to the *same 131,386 acres of surveyed* lands. The judgment being for $2,660.57 and penalties and costs.

These two cases, *Nos. 170* and *171*, involve precisely the same question.

Printed briefs and arguments are filed in this court by the State in each case. *mutatis mutandis*,

The briefs and arguments are the same in each case, and, *ab convenienti*, cite the pages and folios of the transcripts in both cases.

The only question in each case is: Could the State legally tax the possessory claim of the C. P. R. R. Co. to 131,386 acres of surveyed land?

There were appeals by both parties to the State Supreme Court in the case No. 170. And there were *also* appeals to the State Supreme Court by both parties in the case *No. 171*.

In each case matters were decided in the State Court which are not before this court on the writs of error. Furthermore, the transcript here in the case No. 171 refers to the transcript in the case No. 170.

It may be well, therefore, for the better understanding of what was decided to state the cases somewhat fully, *but always bearing in mind that, in both of the said cases here, there is but one question or contention, and that is as to the legality of the tax on the possessory claim of said 131,386 acres of surveyed lands.*

STATEMENT OF CASE.

No. 171.

The State of Nevada brought action, in the State Court, against the C. P. R. R. Co., for the amount of taxes assessed by the State of Nevada, on the property of the C. P. R. R. Co., in said State, for the fiscal year 1889.

See Complaint, Transcript 170, pp. 9–11, folios 22–25.
171, pp. 9–11, folios 21–25.

Said property so assessed, included the *possessory claim* of the C. P. R. R. Co., to land embraced within the Acts of Congress, granting lands in aid of the construction of a railroad, from the Missouri river to the Pacific Ocean. Approved July 1, 1862, and July 2, 1864.

The title of which land was acquired by the C. P. R. R. Co., by virtue of said Acts of Congress.

See Answer, Transcript 170, p. 15, folios 34–35.
171, p. 11, folio 27.

The lands so assessed are:

Surveyed lands, acres	131,386
Patented " "	24,123
Unsurveyed lands, acres	195,200

See Stipulation, Transcript 170, p. 16, folio 42.
171, p. 16, folio 36.

There is no question here as to the 24,123 acres of patented land, nor as to the 195,200 acres of unsurveyed lands.

The only question here, on the writ of error, is as to the 131,386 acres of surveyed lands.

The State *nisi prius* Court, decided that said possessory claim to said 195,200 acres of *unsurveyed* land, was not taxable, and that the *possessory* claim to said 131,386 acres of *surveyed* land *was* taxable.

See Decision, Transcript 170, p. 20, folio 47.
171, p. 17, folio 39.

The State appealed the case to the State Supreme Court, claiming that the *nisi prius* court erred in deciding that the possessory claim to the 195,200 acres of unsurveyed land *was not taxable.*

The C. P. R. R. Co. appealed the same case to the State Supreme Court, claiming that the *nisi prius* court erred in deciding that the *possessory claim* to said 131,386 acres of *surveyed* lands *was* taxable.

On said appeal of the State, the State Supreme Court sustained the *nisi prius* court and decided against the State, and in favor of the C. P. R. R. Co., and held that the possessory claim of the C. P. R. R. Co. to the 195,200 acres of *unsurveyed* land *was not* taxable, and affirmed the judgment of the *nisi prius* court.

And the State Supreme Court, on said appeal of the C. P. R. R. Co., sustained the *nisi prius* court and decided against the C. P. R. R. Co. and in favor of the State, and held that the possessory claim of the C. P. R. R. Co. to said 131,386 acres of *surveyed* land *was taxable*, and affirmed the judgment of the *nisi prius* court.

Vide decision, Transcript 170, pp. 30-34, fols. 69-71.
171, p. 27, folio 59.

following the decision in the case No. 170. Transcript 170, pp. 30-34, folios 69-71.

The judgment of the *nisi prius* court, affirmed in the State Supreme Court, is:

For Taxes for the Year [illegible]-1889.

On 24,123 acres patented land.. ..
On 131,386 acres *surveyed land*.... $2,660 57

To which penalties and costs are added.

Vide Judgments, Transcript
171, p. 18, and p. 34.

The State was bound by the decision of the State Supreme Court, holding that the possessory claim to the 195,200 acres of *unsurveyed* land was not taxable. The State was not entitled to a writ of error, there being no federal question available.

But the C. P. R. R. Co., is now before this court, upon writ of error, and claims that the State Supreme Court erred in deciding that the tax on the possessory claim of the 131,386 acres *surveyed* lands is legal, and claims for the purpose of giving this court jurisdiction, that the decision of the State Supreme Court involves a federal question.

The federal question claimed, by the C. P. R. R. Co., is, that the United States has a lien upon this *surveyed* land for the expenses of the surveys of said land, and that it was necessary to construe the *Act of Congress of July 10, 1886; U. S. Statutes at large, 1886, p. 143;* and that the State Supreme Court did construe said Act against the C. P. R. R. Co.

The amount and matter involved in this writ of error is simply the taxes on the said 131,386 acres of *surveyed* lands.

All other matters mentioned in the State Supreme Court decision, are eliminated here.

Vide Decision, Transcript 170, pp. 30–37.
171, pp. 27–34.

There are but three questions that can possibly arise here to be considered by this court:

1. Is there a federal question?

2. If there is a federal question, is it necessary to decide it in order to sustain the decision of the State Supreme Court?

3. If necessary to decide a federal question, was it wrongly decided by the State Court?

I.

Is There a Federal Question?

There is none. The only issue was whether the possessory claim was taxable.

1.

What was decided by the State Supreme Court?

Simply this: That the possessory claim of the C. P. R. R. Co. to said surveyed land is, under the laws of the State of Nevada, taxable.

Can we be mistaken in this?

For the purpose of determining if this be so, please accompany me for a moment, to examine, briefly, the pleadings and issues in the case and the decision of the State Supreme Court.

2.

Complaint.

The complaint of the State alleges, *inter alia:*

That in the year *1889*, the Assessor assessed the *possessory claim* of the C. P. R. R. Co. to said land.

Transcript 170, p. 9, folio 20.
171, p. 14, folio 32.

3.

Answer.

The C. P. R. R. Co., in its answer to said complaint, denies that it had any *possessory claim* to said land, and alleges:

"That said Assessor assessed, to this defendant, a "*possessory claim* of 354,536 acres of land, but this de- "fendant *denies* that, at the time mentioned in the "complaint, or at any other time, or at all, it *ever had*, "*owned, claimed or possessed any possessory claim* to said "lands, or to any part or portion thereof, that it ever "had, or now has, any *possessory interest*, of, in or to "*any of the lands described in the complaint*, or the *pos-* "*session* of the same, or *any part thereof*."

Vide Answer, Transcript 170, pp. 14-15, folio 34.
171, pp. 11, folio 26-27.

4.

Stipulation.

The case was submitted upon the pleadings and stipulation.

It was stipulated that the lands described in the complaint are the following:

Surveyed lands..	131,386 acres
Patented lands.....	24,123 "
Unsurveyed lands.....	195,200 "

And that the C. P. R. R. Co. had mortgaged said lands and leased various portions thereof, etc.

Vide Stipulation, Transcript 170, p. 18, folios 42-43.
171, p. 16, folios 36-38.

5.

Issue: Possessory Claim.

Now what is the issue made by the complaint, answer and stipulation, as to this surveyed land?

Only this and nothing more; whether the possessory claim of the C. P. R. R. Co., to said land is assessable or taxable.

The complaint alleges that the *possessory claim* to said land was taxed. The answer denies that the C. P. R. R. Co. had a *possessory claim*. The stipulation determines the number of acres so assessed and taxed, and shows that the C. P. R. R. Co. mortgaged the said lands and leased various portions of it.

The issue then, begging pardon for the repetition, under these pleadings, and stipulated facts, for the State court to decide, as to this surveyed land, could only be this:

Whether the C. P. R. R. Co. had, or had not, a *possessory* claim to said land, taxable under the State law. Accordingly we find, by reading the decision, that the State Supreme Court decided that the C. P.

R. R. Co. had the *possessory claim to said land* and that said *possessory claim* was, under the laws of the State, legally taxed.

Indeed no other right to said land, *except the possessory claim*, could be taxed, for nothing else was assessed.

The title of the land, according to the pleadings, was not assessed and could therefore not be taxed.

6.

Decision of State Supreme Court.

Thus the State Supreme Court, in its decision in this case, speaking through Justice Bigelow, an eminent jurist, says:

" It will be noticed that it is only the *possessory* " *claim* to this land that is *assessed*. * * * It is " evident that the thing attempted to be taxed is " something less than the fee. While in view of the " fact that any sale of Government land for taxes, is " simply null and void,

" McGoon v. Seales, 9 Wall. 23, Black Tax " Titles, Sec. 129,

" it is difficult to understand how any such sale could " ever affect the Government title or its lien upon the " land. It is clear, under the decisions, that it would " not do so here. Against such assessment, whatever " may be said of its validity otherwise, no objection " could be made on the ground that it was an attempt " to subject the property of the United States to tax- " ation. Nothing but the defendant's interest in the " land can be reached by such an assessment. It can-

" not possibly affect the Government title or lien, any " more than a voluntary sale by the defendant would " do so.

" Wright v. Cradlebaugh, 3 Nev. 341.
" Forbes v. Gracey, 94 U. S. 762."

Vide Decision, Transcript 170, pp. 33–34, folio 71.
171, p. 27, folios 59–60.

Following the Decision in Transcript 170, pp. 33–34, folio 71.

7.

Decision of the State Court Conclusive.

We need not use any argument here to show that the State Supreme Court was right in deciding that the *possessory claim* of the C. P. R. R. Co. to said surveyed land is taxable under the State Statute.

For, no matter whether the court was right or wrong, upon this point, its decision thereon cannot be reviewed here, upon writ of error, because the decision, upon this point, does not contain a federal question.

8.

Statutes of Nevada.

Under the Statutes of Nevada possessory claims to lands must be taxed.

General Statutes of Nevada (Revenue Laws), Sec. 1080, provides: " That there shall be taxed possessory " claims to the public lands of the United States, or of " this State. Provided, that nothing herein shall be " so construed as to interfere with the primary title " to the lands belonging to the United States."

General Statutes of Nevada (Revenue Laws), Sec. 1081, provides: That the term real estate "shall in- "clude, claim to, or possession of, or right of posses- "sion to, any lands."

General Statutes of Nevada (Revenue Laws), Sec. 1088, provides: That the Assessor shall assess "claims "to, or possession of, or right of possession to, any "land."

Wright v. Cradlebaugh, 3 Nev., 341.
Forbes v. Gracey, 94 U. S., 762.

Cited supra, in the opinion of the State Supreme Court.

9.

Conclusion.

We are, therefore, irresistibly led to the conclusion that the only issue in the case, as made by the pleadings, was, whether the C. P. R. R. Co. had a *possessory claim* to the said land so taxed, and that the decision of the State Supreme Court, upon that issue was, that the C. P. R. R. Co. had such *possessory claim* to said land, and that such *possessory claim* was taxable by the State.

This disposes of the whole case, and *in this* there was no federal question, and, therefore, the decision of the court was conclusive and cannot be reviewed on this writ of error in this court.

II.

If there is a Federal Question is it Necessary to Decide it in Order to Sustain the Decision of the State Supreme Court?

1.

The C. P. R. R. Co., however, claimed that the title to the land of the company could not be taxed, and that the State Supreme Court intimated that, under the express provisions of the Act of Congress of July 10. 1886, the title to these surveyed lands could be taxed by the State.

2.

The Federal Question Foreign to the Issue.

But that question was entirely foreign, and not responsive to the issue made by the pleadings, for, as we have seen, the issue was solely, whether the *possessory claim* to this land was taxable, not whether the *title* to this land was taxable.

Therefore, the contention of the C. P. R. R. Co., that the title to this land could not be taxed under said Act of Congress, is irrelevant and immaterial, and the opinion of the State Court on this pofnt is *obiter dicta*.

3.

The Federal Question not Necessary to Sustain the Decision of the State Supreme Court.

But suppose the State Supreme Court did hold that this surveyed land was taxable, under said Act of Congress of July 10, 1886, the fact still remains that

it was not *necessary to construe* that Act, or to decide that the title to the said surveyed land could be taxed under the said Act. For, strike out, or disregard that part of the decision, and there still remains a solid foundation, upon which the decision and judgment of the State Supreme Court may safely rest.

This Court has ever strenuously insisted upon the rule, that where the decision of a State Court can rest upon a point decisive of the case, independent of a federal question, raised and decided in the case, adverse to the party contending for it, the federal question is *disregarded*, and this court will not take jurisdiction on that ground.

This rule is amply illustrated by numerous decisions of this court.

I beg leave to cite a few of the later decisions upon this rule:

Sayward v. Denny, 158 U. S., 181.
Beatty v. Benton, 135 U. S., 244.
Hale v. Akers, 132 U. S., 554.
State v. Flint, 152 U. S., 586.
Adams Co. v. Burlington, etc., 112 U. S., 123.
Hagar v. California, 154 U. S., 639.
Eustis v. Bolles, 150 U. S., 361.
Powell v. Brunswick, 150 U. S., 433.
McLaughlin v. Fowler, 154 U. S., 663.
Chapman v. Goodnow, 123 U. S., 540.
Chouteau v. Gibson, 111 U. S., 200.
Adams v. Railroad Co., 112 U. S., 123.
Miller v. Anderson, 150 U. S., 132.

Rutland v. Cent. Vermont. 16, S.C.R. 11.
Gillis v. Stinchfield. 16, S.C.R. 131.

The decision of the State Supreme Court, that the tax is on the possessory claim of the C. P. R. R. Co., to this land is conclusive.

Dower v. Richards, 151 U. S., 658.

The pleadings, and the decision of the State Court, are distinctly based on the fact that the tax is on the *possessory claim* to the surveyed land, and not upon the title. This court will look into the case to see if the decision can be sustained outside of the federal question.

Gray v. Coan, 154 U. S., 589.
and authorities supra.

To give this court jurisdiction it must appear affirmatively, not only that a federal question was *presented* for *decision* to the highest court of the State having jurisdiction, *but that its decision was necessary to the determination of the cause*, and that it was actually decided, *and that the judgment as rendered could not have been given without deciding it.*

Davis v. State, 139 U. S., 651.
Cook Co. v. Calumet, etc., 138 U. S., 635.
Johnson v. Risk, 137 U. S., 300.

4.

Conclusion.

It follows that the alleged federal question is entirely excluded from consideration here, in this court. The decision of the State Supreme Court is planted firmly upon another ground, independently of any federal question.

Indeed the C. P. R. R. Co. in no sense represents the United States.

U. P. R. Co. v. Patterson, 154 U. S., 130.

III.

FEDERAL QUESTION NOT WRONGLY DECIDED.

1.

We do not, however, by any means admit that, even if the case depended on the alleged federal question, that the dictum of the State Supreme Court, upon that question, is incorrect.

On the contrary, there can be no doubt that the title of the said surveyed land is *taxable under the said Act of Congress of July 10. 1886.*

The express provision of that Act is: "That *no land* " *granted to any railroad corporation by any Act of Con-* " *gress shall be exempt from taxation by States, Territories,* " *and municipal corporations, on account of the lien of the* " *United States upon the same for the costs of surveying,* " *selecting and conveying the same, or because no patent* " *has been issued therefor,* but this provision shall not " apply to lands *unsurveyed.*" Sec. 1, U. S. Statutes at Large, 1886, p. 143.

The history and purpose of this Act of Congress is quickly told.

In the case of Railroad Company v. Trail County, 115, U. S., 607,

following the cases of Railroad Co. v. Prescott, 16 Wall., 603,

and Railroad Co. v. McShane, 22 Wall., 444,

the court held that, until the United States was

reimbursed for the expenses of the surveying of those railroad lands, they were not subject to State taxation.

Advantage was taken of these decisions, by the Railroad Companies, to escape taxation on these railroad lands.

To obviate this, Congress passed said Act of July 10. 1886, declaring that those lands shall *not be exempt from* State or municipal taxation, on account of the liens of the United States on the same, for the costs of surveying, etc.

The C. P. R. R. Co., notwithstanding this express provision of this Act of Congress of July 10. 1886, contends that the State could not tax these surveyed lands, on the assumption "that the United States is "the owner, and in the possession of the lands, as to "which it only grants to the State a right to tax."

As to this contention it is sufficient to cite, *Wright* vs. *Roseberry, 121 U. S., 496*, and other decisions of this court, clearly showing, that the grants to the Railroad Companies, under the *Railroad Acts of Congress of 1862 and 1864*, are *in præsenti*.

The companies, under these Acts, have the *present title* to these railroad lands, which would be taxable by the State, except for the lien of the United States for surveying, etc.

The only interest the Government has in these lands, is such lien and that lien, by the *express provision of Sec. 1, of said Act of Congress of July 10. 1886, shall not exempt the surveyed lands from taxation by the State.*

2.

Provisos.

The power given to the State to tax these surveyed lands, was made subject to these provisos:

1. "That any such land, sold for taxes, shall be taken by the purchaser, subject to the lien for costs of surveying, etc."

2. And "that at any sale of lands, under the provisions of this Act, the United States may become a preferred purchaser."

3.

Acceptance by State of the Conditions of the Act.

Counsel contend that, to give validity and force to said Act of Congress, it is necessary that the State, by *Legislative Act*, accept the conditions in said provisos, and that, in the absence of such acceptance, by the State *Legislature*, the United States has no right to become a preferred purchaser, at such tax sale.

First Proviso.

It is plain that, by the first proviso of said Act of Congress, the purchaser, at the tax sale, takes the land subject to the Government lien thereon for surveying, etc.

This protects the lien of the Government on the lands, in the hands of the purchaser, at the tax sale, as fully as in the hands of the railroad company, before the tax sale.

The purchaser, at the tax sale, takes the land *cum onere*.

He must pay the Government the cost of surveying, etc. He stands in the shoes of the railroad company as to the Government lien for surveying, etc.

Thus the lien of the United States is not affected, in the lease, by the tax sale.

The Government has the same rights and remedies against these lands, in the hands of the tax purchaser, as it had against the lands, in the hands of the railroad company, before the tax sale.

Under the decisions of this court, prior to said Act of Congress of July 10. 1886, a tax sale of such land would be void, because of such Government lien.

By said Act of Congress such tax sales on such surveyed lands are authorized, on condition, that such lien shall still continue on the land, in the hands of the tax purchaser.

The right of the tax purchaser, to such land, depends on said Act of Congress. He can, therefore, take the land only upon the conditions of said Act. If he repudiates the conditions, he nullifies his purchase.

He must comply with the requirements of this Act of Congress, to reap its benefits.

If you take anything by a statute, you must take it as prescribed by that statute. You must take it *cum onere. Cujus est commodum ejus debet esse incommodum.*

"Wouldst thou Pluto's power invoke,
Thou must bear the Stygian yoke."

Second Proviso.

As to the second proviso of said Act of Congress, counsel assume that the United States could not be a preferred purchaser at a tax sale, under the Nevada Revenue Laws. Why not?

Surely there is nothing in the Nevada Laws which prevents the United States from being such purchaser. The best bid for the property must be taken.

Statutes of Nevada.

Sec. 225 of the Practice Act of the State of Nevada provides that:

"All sales of property under execution shall be " made at auction to the highest bidder."

There are no restrictions as to bidders at such execution sales, except that said section 225 provides that:

"Neither the officer holding the execution, nor his " deputy, shall become a purchaser, or be interested " in any purchase at such sale."

Section 36 of the Revenue Laws of the State of Nevada provides that the provisions of said Practice Act "Are hereby made applicable to the proceedings " under this Act (Revenue Laws), provided, that the " officer, in selling such property, shall only sell the " smallest quantity that will pay the judgment and " all costs."

If there be a bid, and the United States make an equal bid, then the question might arise who should be preferred.

In such case the bid of the United States would have the preference.

No such *legislative act*, on the part of the State, as is contended for by counsel, is necessary to accept the conditions of said Act of Congress, or to secure the rights of the United States thereunder.

The acceptance, by the State, of the right to tax this land, under said Act of Congress of July 10. 1886, is shown by the fact that this land was taxed by the State, and, therefore, the State, as well as the tax purchaser, is conclusively presumed to accept, and to be bound by, the conditions of said Act of Congress.

The *acceptance* of the conditions of a statute must be presumed with the *acceptance* of a right conferred by that statute.

Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 525.

The fundamental principles on these questions of acceptance, and paramount authority of said Act of Congress, are thus ably stated by the State Supreme Court in its opinion:

4.

Opinion of State Court.

"As the sovereign proprietor, Congress has full "power to dispose of the public lands, upon such "terms and under such conditions as it may deem "proper.

"Ironie v. Marhall, 20 How. 561.

"Van Sickle v. Haines, 7 Nev. 261.

"Thus in Gibson v. Chateau, 13 Wall. 99, it is said: "'With respect to the public domain the constitution "'vests in Congress, the power of disposition and of "'making all needful rules and regulations.

" ' That power is subject to no limitation; Congress
" ' has the absolute right to prescribe the times, the
" ' conditions, and the mode of transferring this prop-
" ' erty, or any part of it, and to designate the persons
" ' to whom the transfer shall be made.'

" It will scarcely be denied that the right which the
" United States still has, in this land, is an interest,
" in the public domain, as such, and over which it has
" such full authority.

" Having such authority no reason is perceived why
" the provisos in the Act of July 10. 1886, do not be-
" come the supreme law of the land, so far as the
" taxation of these grants is concerned. Admittedly,
" Congress has no right to enact laws regulating, gen-
" erally, the assessment, the taxation, or the sale for
" taxes, of property in the different states. But as to
" these lands the United States is both a proprietor
" and a sovereign. The Acts of Congress, disposing of
" them, become general laws binding upon all, because
" all such Acts are specially within the powers con-
" ferred upon it by the constitution.

" There is nothing in the Act of July 10. 1886, indi-
" cating that Congress expected a legislative accept-
" ance by the States, of the terms proposed, and in
" our judgment there is no occasion for such accept-
" ance. The Act is a grant to the States and Terri-
" tories, in which the conditions become the control-
" ling law. The Act and the State Statutes concerning
" revenues must be construed together. All the State
" laws apply to the taxation of these lands, until they
" come in conflict with the conditions prescribed by
" Congress, and then they must give way. Thus con-

" strued we perceive no reason why they may not, " without further legislation, work harmoniously to- " gether. As just stated, the Act of July 10. 1886, is " a grant to the State, granting it the privilege, so far " as the United States is concerned, of taxing a large " amount of property, which, previously, had not been " subject to taxation. It conferred a benefit upon the " State, to the acceptance of which, there can be no " possible objection. Under these circumstances, " conceding it to be necessary that the State should " have accepted the conditions of the grant, in the " absence of a showing that it has refused to do so, " such acceptance is presumed.

" Fort Leavenworth R. R. v. Lowe, 114, U. S. " 525, 27 Kan., 749.

" Again, it would seem that the fact that these " lands have been *assessed* by the State, and that the " State is now in court endeavoring to enforce that " assessment, which without this Act, it clearly had " no right to assess, should of itself, be considered an " acceptance of the conditions therein contained.

Transcript 170, pp. 32–33.

5.

Assignment of Error Incorrect.

The IV assignment of error herein (Transcript 170, p. 38, ℣. 171. p. 35), that " the Supreme Court, " of the State of Nevada, erred in holding and " adjudging that there was no necessity for an accept- " ance by the State of Nevada of the terms and condi- " tions imposed upon the State of Nevada by said

" Act of Congress," is therefore incorrect, for as we have seen, the State Supreme Court decided that the State did accept the said conditions.

This Case in this Court rests solely upon this Assignment.

The State has irrevocably accepted the conditions of said Act of Congress of July 10. 1886:

1. By the acts of its officers, in taxing said lands, under the provisions of said Act of Congress.

2. By the State accepting the benefits and advantages conferred by said Act of Congress.

3. By this very decision of its Supreme Court deciding that the State has accepted the conditions of said Act of Congress.

The State is thus forever estopped from denying, as against the United States, or its grantees, that it accepted the conditions of said Act of Congress *cum oneribus omnibus.*

No such affirmative legislation on the part of the State is necessary. The State, in its constitution, born in the throes of the civil war, asseverates in fervent language its paramount allegiance to the federal government.

Sec. 2, Art. 1, of the Nevada Constitution is thus:

" The paramount allegiance of every citizen is due " to the federal Government in the exercise of its " constitutional powers."

And though this were not in the Nevada constitution, yet it is the foundation on which stands, firmly established, the grand superstructure of the Government of the United States, for, Article Sixth of the Consti-

tution of the United States is self executing, and requires no confirmation by State constitution or laws, to make it the *Suprema Lex*.

It ordains:

" Art. 6. This constitution and the laws of the " United States, which shall be made in pursuance " thereof, and all treaties made, or which shall be " made, under the authority of the United States, " shall be the supreme law of the land, and the Judges " of every State shall be bound thereby, anything in " the constitution or laws of any State to the contrary " notwithstanding."

This is sound American constitutional doctrine, and notwithstanding the Greeks and Romans derided an *imperium in imperio* as a political monstrosity, it has worked well, and it has reared a mighty nation from a few patriots, and it will remain the prop of the Government so long as the embers of patriotism shall continue to glow in the breast of the American people.

Now, if the Act of Congress of July 10. 1886, is constitutional, of which there can be no doubt, it is the " supreme law of the land," and no legislation, pro or con, by the State can in anywise affect it.

IV.

Acceptance of Conditions by State not a Federal Question.

1.

Indeed the question here is not as to the construction or validity of the Act of July 10. 1886.

The State Court did not construe the Act differently

from the C. P. R. R. Co. There was no question in the State Court as to the intent and meaning of the Act.

The power conferred upon the State to tax *surveyed lands* was not and could not be questioned. Nor was there any question as to the intent and meaning of the provisos of the said Act.

But the question *was*, whether the State *accepted* the provisos or conditions of the said Act; Whether the State, by its acts, is estopped from denying that it accepted the conditions contained in the provisos.

The only question necessary to be considered and determined was the question of estoppel, and the State Supreme Court decided that the State was estopped, and by its acts did accept the conditions of the said Act of Congress.

This was determined by the State Supreme Court upon the *general principles of the law of estoppel and acceptance.*

This decision of the State Supreme Court in no wise involved the construction of the said Act of Congress. It involved no federal question. Let us see what was the contention in the State Court.

The assignment of error by the C. P. R. R. Co., in its Statement on Appeal to the State Supreme Court, is in these words:

" That the State of Nevada has never, by its *proper* " *legislative department, accepted the terms nor conditions* " *contained in that certain Act of Congress, entitled 'An* " *'Act to provide for taxation of Railroad grant lands, and* " *'for other purposes.' Approved July 10, 1886.*"

See Assignments of Error, Transcript 170, p. 23, 171, p. 20.

Thus it is seen that the contention was that the State never accepted, by its *Legislature*, the conditions contained in the said provisos of said Act of Congress.

2.

The State Court Decided that the State Did Accept the Conditions of the Act of Congress.

The State Supreme Court decided that the State, having accepted the benefits of the said Act of Congress, must be presumed to have accepted its conditions; that the said Act of Congress did not prescribe the *mode* of acceptance by the State, whether by *Legislature*, or otherwise; and that the State did accept the conditions of the Act,

Because—

1. The Act is the controlling law.

2. "Conceding it to be necessary that the State "should have accepted the conditions of the grant, in "the absence of showing that it has refused to do so, "such acceptance is to be presumed."

3. "The fact that these lands have been assessed "by the State, and that the State is now in court en- "deavoring to enforce that assessment which, without "this Act, it clearly had no right to assess, should, of "itself, be considered an acceptance of the conditions "therein contained."

State Supreme Court Decision, Transcript 170, p. 33.
171, p. 27.

It is therefore certain that the contention in the State Supreme Court was not about the meaning or construction of said Act of Congress; nor was there

any contention about the right of taxation conferred on the State by said Act of Congress; nor was there any contention about the meaning or construction of the conditions in the provisos of said Act; but the only contention was as to *whether* said *conditions were accepted by the State.*

The C. P. R. R. Co., by its learned counsel, contended that the acceptance by the State Legislature of the conditions of said Act of Congress was necessary before the State could exercise the right of taxation conferred by said Act.

The State Supreme Court held upon said contention that, if it *were* necessary for the State to accept such conditions, the State *did, in fact,* accept the said conditions and is bound by its acceptance.

The acceptance of the said conditions by the State was proved and shown, not by any federal question, not by any mode prescribed by the Act of Congress, for no modus operandi as to how to accept, or as to the manner of such acceptance *is* prescribed by the said Act.

But the acceptance by the State was shown and decided by the State Supreme Court in its decision, not upon the construction of the said Act, but upon the general principles of jurisprudence of the State, upon the general principles of the law of acceptance, and of the law of estoppels, and upon the general and universal maxims:

Cujus et dare ejus est disponere.

et

Cujus commodum ejus incommodum.

No construction of this Act of Congress could possibly evolve a rule for determining the requirements of a legal acceptance.

The court had to resort, and did resort, to the general law, dehors this Act of Congress, to determine whether the State had accepted the conditions of the said Act.

This determination of the court required no construction of the Act of Congress, and it involved no federal question.

These principles are fully illustrated in a number of cases decided in this court.

I will cite a few recent ones in addition to those above cited:

Marrow vs. Brinkley, 129 U. S., 178.
Powell vs. Supervisors, 150 U. S., 433.
State vs. Flint & P. M. R. Co., 152 U. S., 363.

In the latter case this court, speaking through Chief Justice Fuller, say:

" As its judgment (of State court) rested upon the " decision of a question (i. e. estoppel), which was not " federal, this court has no jurisdiction to review it."

V.

No Room for Construction or Federal Question.

The said Act of Congress of July 10. 1886, authorizes the taxation of the *surveyed* lands, *ex vi terminorum ipsorum*. This Act authorizes such taxation in direct, express and unequivocal words.

There is no room for construction or interpretation.

There was no denial in the State court of any right of the C. P. R. R. Co.

There was not, and could not be, any controversy or question as to the meaning of the plain language of the said Act.

The C. P. R. R, Co., cannot be in good faith in claiming a federal question.

To constitute a federal question, there must be a *construction* or *interpretation* of the Act *necessary*.

There must be *ground* for a *question*, a *construction*, an *interpretation*.

The mere application of a statute, plain and unequivocal in its terms, leaving no room for construction or controversy, can, in no just sense, be held to involve a federal question.

And so, as has been held by this court, where a construction of a statute is necessary, and this court determined it, there can be no more federal question predicated on the statute, upon the point decided.

This Act of Congress is perfectly plain.

He that runs may read it and understand it at first glance.

The first and foremost rule, and the rule of all rules of construction and interpretation, as ancient as Minos, as old as the Pandects, as unchangeable as Everest, is:

"That it is not permitted to interpret, or construe, what has no need of interpretation or construction."

"*Absoluta sententia expositore non indiget.*"

"*A verbis legis non est recedendum.*"

2 Justinian Inst., 533.
Dwarris' Maxims XVI.
Broom's Maxims, p. 551.
Lieber's Hermeneutics, 119.

"When the various sections of the Statute are clear, "plain and unambiguous, the Legislature must be un- "derstood to mean just what is has expressed. In "such case there is no room for construction."

Odd Fellows' Bank v. Quillen, 11 Nev., 109.

Counsel contend that this Act of Congress requires the Legislature of the State to accept its conditions. That was the only contention of counsel.

The said Act, as is well observed by the State Supreme Court, contains no such provision, and it does not require *legislative acceptance.*

This interpolation, sought to be introduced into this Act of Congress, by the learned counsel, can under no possible rule be permitted.

"Interpretation cannot import words into the "Statute."

"The Judge is only to expound what he finds written."

Bishop on the Written Laws, Sec. 145.

"A Statute cannot be interpreted to mean what it "does not express."

Wall v. Blasdell, 4 Nev., 241.

Perhaps by some psychologic means or hypnotic power, possessed by the learned counsel, they were able to search the deep recesses of the minds of the Congressmen, and there discovered their intention not expressed in this Act of Congress.

But if Congress had any such intention imputed to it by counsel, it failed to express it in any form of words.

If Congress had any such intention, it was strangled before its parturition.

It is a *casus omissus* which the courts cannot supply.

Bishop on Written Laws, Sec. 146.
Broom's Legal Maxims, p. 44.
Pitnam v. Flint, 10 Pick., 306.

Prayer that Judgment be Affirmed in this Case No. 111.

Now, may it please the Court, it is evident that this writ of error was sued out for delay.

The State of Nevada, therefore, prays that the judgment of the State court be affirmed, with 10 per cent per annum damages on the amount of said judgment from the date of said judgment and for costs; and that the Clerk of this court be directed to insert the damages and costs in the mandate to the State court.

Whatever in this brief you find,
"Be to its virtues very kind,
Be to its faults a little blind."

Respectfully submitted,

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